

2554
No. 12055

United States
Court of Appeals
for the Ninth Circuit

JAMES G. SMYTH, Collector of Internal Revenue
of the First Internal Revenue Collection District
of California,

Appellant,

vs.

CALIFORNIA STATE AUTOMOBILE ASSO-
CIATION, a corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

NOV 23 1948

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Attorneys for Plaintiff and Appellee.

In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

Civil No. 26017-S

CALIFORNIA STATE AUTOMOBILE ASSO-
CIATION, a Corporation,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
of the First Internal Revenue Collection District
of California,

Defendant.

COMPLAINT FOR RECOVERY OF INCOME
AND EXCESS-PROFITS TAXES ILLE-
GALLY ASSESSED AND COLLECTED

Comes now the Plaintiff and, for cause of action
against Defendant, alleges:

I.

That Plaintiff is, and at all times herein men-
tioned was, a corporation organized and existing
under and by virtue of the laws of the State of
California, duly qualified to transact business
therein and having its principal place of business
and office at 150 Van Ness Avenue, San Francisco
2, California, and within the First Internal Reve-
nue Collection District of said State of California.

II.

That Defendant is now and at all times since
the 14th day of May, 1945, has been the duly ap-

pointed, qualified and acting Collector of Internal Revenue for the First Internal Revenue Collection District of California. That Defendant is the person to whom the income and excess-profits taxes, [1*] together with interest, the sums herein sought to be recovered, were paid by the Plaintiff, as hereinafter set forth. That at all times herein mentioned, Defendant was and still is a resident of the City and County of San Francisco, State of California, and of said Northern District of California, Southern Division.

III.

That jurisdiction of this Court exists under Title 28 U.S.C.A., Section 41 (5), and under Section 3772 (a)(2) of the Internal Revenue Code.

IV.

That since the inception of Federal income taxation in 1913, Plaintiff had been exempt from the imposition of any Federal income and/or excess-profits taxes until it was finally advised by the Commissioner of Internal Revenue in a letter dated July 27, 1945, copy of which is attached hereto and made a part hereof, marked "Exhibit 1", that further exemption from such taxation was denied and that the Plaintiff would be required to file income tax returns and pay any tax shown to be due thereon for each of its taxable years beginning on or after January 1, 1943.

V.

That only because of the requirement by the Commissioner of Internal Revenue, as aforesaid,

*Page numbering appearing at foot of page of original certified Transcript of Record.

for the filing of said tax returns, did the Plaintiff file income and excess-profits tax returns, and then under protest, and pay the amount of income and excess-profits taxes shown to be due thereon, together with accumulated interest upon said taxes. Federal tax returns for the calendar years 1943 and 1944, respectively, were accordingly filed on the respective forms provided for such purposes, by Plaintiff with Defendant, as Collector of Internal Revenue for the First District of California, on September 14, 1945, and the following taxes were paid at the time said returns were so filed:

For the year 1943, income tax in the amount of \$27,633.38;

For the year 1943, excess-profits tax in the amount of \$129,178.22;

For the year 1944, income tax in the amount of \$36,844.39;

For the year 1944, excess-profits tax in the amount of \$23,306.42 [2]

VI.

FIRST CAUSE OF ACTION

For a first cause of action against Defendant, Plaintiff alleges that the income tax for the year 1943 paid by Plaintiff to Defendant in the amount of \$27,633.38 on September 14, 1945, together with interest thereon paid the Defendant in the amount of \$2,485.11 on October 23, 1945, were illegally collected from the Plaintiff, and that no amount of income tax was legally due and owing from the Plaintiff by reason of the following facts:

(a) That Plaintiff was incorporated under the laws of the State of California on September 4, 1907, and until finally required by the aforesaid letter from the Commissioner of Internal Revenue, dated July 27, 1945, ("Exhibit 1"), to file income tax returns as aforesaid, had been exempt from the payment of any Federal income and/or excess-profits taxes.

(b) That in furtherance of the purpose for which it was originally organized as an automobile club, Plaintiff has provided during the years 1943 and 1944, as well as prior and subsequent to said years, (1) a Touring Bureau which provides the members with complete touring data and assists them in planning motor trips; (2) an emergency Road Service Department, which makes arrangements for the rendering of emergency road service to members who encounter automobile trouble on the highways; (3) a Road Sign Department, which operates in conjunction with state and local authorities a service consisting of the erection and maintenance of direction and warning signs and historical markers; (4) a Public Safety Department which carries on an active and aggressive campaign to reduce traffic accidents, eliminate traffic hazards and generally improve traffic conditions; (5) an Adjustment and Traffic Department, which advises and assists the members with respect to traffic violations and accidents; (6) a License Department which assists members in the annual renewal of automobile registration with the State Department of Motor Vehicles and obtaining auto-

mobile license plates, as well as Federal auto tax stamps; and (7) a Magazine Department which publishes and distributes to the members a magazine, keeping them informed of motoring conditions and improvements, and specializing [3] in travel information with respect to trips to points of interest where members will find pleasure and recreation, and which has contained no paid advertising material since January 1, 1942.

VII.

That Section 101(9) of the Internal Revenue Code, in force during the years 1943 and 1944, as well as prior and subsequent thereto, provides exemption from income tax on qualifying corporations in the following language:

“Clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.”

That Plaintiff is an automobile club organized and operated exclusively for the pleasure and recreation of its members and for other non-profitable purposes, and that no part of Plaintiff's earnings inure to the benefit of any private shareholder or member.

VIII.

That the whole purpose of the organization of Plaintiff was to provide, by association and cooperation among its members, for the achievement of its prime objective, namely, the pleasure and recreation of the passenger-car owners constituting

its membership, by the improvement and marking of roads, obtaining legislation to further the construction of more and better highways, and furnishing travel information and guidance and assistance to its members, all on a non-profit basis.

IX.

That during the years 1943 and 1944, and for a number of years prior and subsequent thereto, Plaintiff has operated as an automobile club with a board of directors made up of 21 members which meets regularly every month throughout the year, with the exception of the month of July when there is no meeting due to the usual vacation period, and each year the board of directors appoints ten committees made up of from 5 to 9 members each, the names of which committees are as follows:

Executive Committee—Finance Committee—Legislative Committee—Good Roads Committee—Emergency Road Service Committee—Public Safety [4] Committee—Membership Committee—Publicity Committee—Transcontinental Highway Committee, and Forestry Committee.

X.

That the California State Automobile Association Inter-Insurance Bureau, a reciprocal inter insurance exchange, which is an entirely separate and distinct organization and entity from Plaintiff, was formed some years ago and is operated by and on their own particular behalf, and not on behalf of Plaintiff, by a group of members of Plaintiff Association for the purpose of providing indemnity among themselves, that is, the individual subscrib-

ers to the said Bureau, who desire to protect themselves against various automobile hazards, the exchange of indemnity being effected by an agent holding a power of attorney for that purpose from each individual in said group; that Plaintiff and the said Bureau, each with its own staff of employees, occupy common quarters and share the expense of same; that they also share certain other expenses when, for convenience, an employee of one organization also performs services for the other, but neither Plaintiff nor the said Bureau derives any profit whatsoever from the operation of the other.

XI.

That Plaintiff was not during 1943 or 1944, or at any other time, organized or operated for the purpose of rendering services of a purely commercial nature to its members, and the great majority of such services are not obtainable by members commercially at any cost.

XII.

That on or about October 23, 1945, and within two years of the date of payment of the aforesaid amount of \$27,633.38 as income taxes for the year 1943, and the payment on October 23, 1945, of interest in the amount of \$2,485.11, making a total of \$30,118.49, erroneously and illegally collected as aforesaid, Plaintiff filed its claim for refund on Form 843 for the calendar year 1943, a true copy of which is attached hereto and made a part hereof, marked "Exhibit 2". Said claim set forth, under oath, the grounds for refund hereinabove relied

upon and facts sufficient to apprise the Defendant and the Commissioner of Internal Revenue of the exact basis of the claim. Since the [5] Commissioner of Internal Revenue has rendered no decision on said claim within the period of six months from the date of filing said claim, this suit for refund is brought under the authority and in accordance with the provisions of Section 3772 (a)(2) of the Internal Revenue Code.

XIII.

That by reason of the above facts, Defendant erroneously and illegally collected \$27,633.38 in income taxes from Plaintiff, together with \$2,485.11 interest thereon to date of payment, making a total of \$30,118.49, for the year 1943, all of which Defendant has refused and still does refuse to repay or refund to Plaintiff, notwithstanding Plaintiff has made demands and claims therefor according to law.

SECOND CAUSE OF ACTION

For a second and separate cause of action against Defendant, Plaintiff further alleges:

XIV.

The allegations contained in paragraphs I to V inclusive, are hereby fully and completely incorporated herein by reference in this cause of action.

XV.

That the excess-profits tax for the year 1943 paid by Plaintiff to Defendant in the amount of \$129,178.22 on September 14, 1945, together with interest thereon paid to Defendant in the amount of \$11,617.19 on October 23, 1945, were illegally col-

lected from the Plaintiff, and that no amount of excess-profits tax was legally due and owing from the Plaintiff, by reason of the facts stated herein under the First Cause of Action in paragraph VI (a) and (b) and paragraphs VII to XI inclusive, all of which are hereby fully and completely incorporated herein by reference in this Second Cause of Action.

XVI.

That on or about October 23, 1945, and within two years of the date of payment of the aforesaid amount of \$129,178.22 as excess-profits tax for the year 1943, and the payment on October 23, 1945, of interest in the amount of \$11,617.19, making a total of \$140,795.41, erroneously and illegally collected [6] as aforesaid, Plaintiff filed its claim for refund on Form 843 for the calendar year 1943, a true copy of which is attached hereto and made a part hereof, marked "Exhibit 3". Said claim set forth, under oath, the grounds for refund hereinabove relied upon and facts sufficient to apprise the Defendant and the Commissioner of Internal Revenue of the exact basis of the claim. Since the Commissioner of Internal Revenue has rendered no decision on said claim within the period of six months from the date of filing said claim, this suit for refund is brought under the authority and in accordance with the provisions of Section 3772 (a)(2) of the Internal Revenue Code.

XVII.

That by reason of the above facts, Defendant erroneously and illegally collected \$129,178.22 in

excess-profits taxes from Plaintiff, together with \$11,617.19 interest thereon to date of payment, making a total of \$140,795.41, for the year 1943, all of which Defendant has refused and still does refuse to repay or refund to Plaintiff, notwithstanding Plaintiff has made demands and claims therefor according to law.

THIRD CAUSE OF ACTION

For a third and separate cause of action against Defendant, Plaintiff further alleges:

XVIII.

The allegations contained in paragraphs I to V inclusive are hereby fully and completely incorporated herein by reference in this cause of action.

XIX.

That the income tax for the year 1944 paid by Plaintiff to Defendant in the amount of \$36,844.39 on September 14, 1945, together with interest thereon paid to Defendant in the amount of \$1,102.81 on October 23, 1945, were illegally collected from the Plaintiff, and that no amount of income tax was legally due and owing from the Plaintiff by reason of the facts stated herein under the First Cause of Action in paragraph VI (a) and (b) and paragraphs VII to XI inclusive, all of which are hereby fully and completely incorporated herein by reference in this Third Cause of Action.

XX.

That on or about October 23, 1945, and within two years of the date of payment of the aforesaid amount of \$36,844.39 as income tax for the year 1944, and the payment on October 23, 1945, of in-

terest in the amount of \$1,102.81, making a total of \$37,947.20, erroneously and illegally collected as aforesaid, Plaintiff filed its claim for refund on Form 843 for the calendar year 1944, a true copy of which is attached hereto and made a part hereof marked "Exhibit 4". Said claim set forth, under oath, the ground for refund hereinabove relied upon and facts sufficient to apprise the Defendant and the Commissioner of Internal Revenue of the exact basis of the claim. Since the Commissioner of Internal Revenue has rendered no decision on said claim within the period of six months from the date of filing said claim, this suit for refund is brought under the authority and in accordance with the provisions of Section 3772 (a)(2) of the Internal Revenue Code.

XXI.

That by reason of the above facts, Defendant erroneously and illegally collected \$36,844.39 in income taxes from Plaintiff, together with \$1,102.81 interest thereon to date of payment, making a total of \$37,947.20, for the year 1944, all of which Defendant has refused and still does refuse to repay or refund to Plaintiff, notwithstanding Plaintiff has made demands and claims therefor according to law.

FOURTH CAUSE OF ACTION

For a fourth and separate cause of action against Defendant, Plaintiff further alleges:

XXII.

The allegations contained in paragraphs I to V inclusive, are hereby fully and completely incorporated herein by reference in this cause of action.

XXIII.

That the excess-profits tax for the year 1944 paid by Plaintiff to Defendant in the amount of \$23,306.42 on September 14, 1945, together with interest thereon paid to Defendant in the amount of \$697.60 on October 23, 1945, [8] were illegally collected from the Plaintiff, and that no amount of excess-profits tax was legally due and owing from the Plaintiff, by reason of the facts stated herein under the First Cause of Action in paragraph VI (a) and (b) and paragraphs VII to XI inclusive, all of which are hereby fully and completely incorporated herein by reference in this Fourth Cause of Action.

XXIV.

That on or about October 23, 1945, and within two years of the date of payment of the aforesaid amount of \$23,306.42 as excess-profits tax for the year 1944, and the payment on October 23, 1945, of interest in the amount of \$697.60, making a total of \$24,004.02, erroneously and illegally collected as aforesaid, Plaintiff filed its claim for refund on Form 843 for the calendar year 1944, a true copy of which is attached hereto and made a part hereof marked "Exhibit 5". Said claim set forth, under oath, the grounds for refund hereinabove relied upon and facts sufficient to apprise the Defendant and the Commissioner of Internal Revenue of the exact basis of the claim. Since the Commissioner of Internal Revenue has rendered no decision on said claim within the period of six months from the date of filing said claim, this suit for refund is

brought under the authority and in accordance with the provisions of Section 3772 (a)(2) of the Internal Revenue Code.

XXV.

That by reason of the above facts, Defendant erroneously and illegally collected \$23,306.42 in excess profits taxes from Plaintiff, together with \$697.60 interest thereon to date of payment, making a total of \$24,004.02, for the year 1944, all of which Defendant has refused and still does refuse to repay or refund to Plaintiff notwithstanding Plaintiff has made demands and claims therefor according to law.

Wherefore, Plaintiff prays this Honorable Court for judgment that the Plaintiff was exempt from the payment of income tax, as well as excess-profits tax, under Section 101(9) of the Internal Revenue Code for the years 1943 and 1944, and that Plaintiff has overpaid its liability for income taxes and interest thereon, as well as excess-profits taxes and interest thereon, for [9] the calendar years 1943 and 1944, in the following amounts:

For the year 1943, income tax in the amount of \$27,633.38, and interest in the amount of \$2,485.11, making a total of \$30,118.49;

For the year 1943, excess-profits tax in the amount of \$129,178.22, and interest in the amount of \$11,617.19, making a total of \$140,795.41;

For the year 1944, income tax in the amount of \$36,844.39, and interest in the amount of \$1,102.81, making a total of \$37,947.20;

For the year 1944, excess-profits tax in the amount of \$23,306.42, and interest in the amount of \$697.60, making a total of \$24,004.02; and

That Plaintiff have and recover from Defendant the total amount of \$232,865.12 plus interest thereon from the dates of overpayment as provided by law; and for such further relief as may be meet and just.

/s/ GEORGE E. SANDFORD,
Attorney for Plaintiff.

(Duly Verified.) [10]

“EXHIBIT 1”

Copy

Treasury Department
Washington 25

Office of the Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:P:T:1 FDF

Jul 27 1945

California State Automobile Association
150 Van Ness Avenue
San Francisco, California

Gentlemen:—

Reference is made to the request of your attorney, Mr. A. H. Deibert, that the Bureau's ruling of September 23, 1944, holding that you are not entitled to exemption from Federal income tax under the provisions of section 101(9) of the Internal Revenue Code be reconsidered, in support of which request a brief was filed with this office by Mr. Deibert during the early part of this year.

Careful consideration has been given to the statements and arguments made by Mr. Deibert and to the cases cited by him in support of his contention that you are entitled to the exemption provided in the law and it has been concluded that the ruling contained in Bureau letter of September 23, 1944, should not be disturbed.

In the letter of September 23, 1944, which was approved by the Acting Secretary of the Treasury, it was stated that the ruling contained in that letter would not be applied to taxable years beginning prior to January 1, 1943. During May 1945 Mr. Deibert was advised orally of the conclusion that the ruling of September 23, 1944, holding that you are not entitled to exemption, should not be disturbed and on June 14, 1945, he addressed a letter to this office requesting, for reasons stated therein, that the ruling be not applied to taxable years begun prior to January 1, 1945.

Mr. Deibert stated that you have had a tax exempt status throughout your existence which began some years prior to March 1, 1913, and that it is inequitable to apply the adverse ruling retroactively to January 1, 1943, in view of the fact that the Bureau first raised the question of your exemption by letter to you from the collector of internal revenue at San Francisco dated September 10, 1941, and that the information requested in that letter was furnished on October 5, 1941, but that it was not until about October 1, 1944, that you received the ruling of September 23, 1944, advising that you are held not entitled to tax exemption.

The records of the Bureau fail to show that you filed proof of exemption or otherwise requested a ruling on your exempt status, or were ever held by this Bureau to be entitled to exemption from Federal income tax prior to September 10, 1941, when you were requested by the collector to furnish information for use in determining whether you are entitled to exemption.

Prior to the time that the information submitted by you in 1941, was taken up for consideration a substantial number of automobile clubs had been held to be [11] entitled to exemption under section 101(9) of the Internal Revenue Code and prior revenue acts. While the information submitted to you was under consideration in this office, it was decided to reexamine the general question of whether an automobile club or association having the usual purposes and activities is entitled to the exemption provided in section 101(9) in connection with a particular case, and in G.C.M. 23688 (C.B. 1943, 283) it was concluded for the reasons therein stated that the subject automobile association is not entitled to the exemption. This opinion was first published during the first part of July 1943, after which the information submitted by you during October 1941 was again taken up for consideration in the light of the view expressed in that General Counsel's memorandum, and it was concluded with the concurrence of the Chief Counsel and the approval of the then Acting Secretary of the Treasury that you are not entitled to the exemption provided in section 101(9) and that under

authority granted by section 3791(b) of the Internal Revenue Code the ruling would not be applied to years begun prior to January 1, 1943.

Since the letter to you from the collector of internal revenue dated September 10, 1941, requesting information for use in determining whether you are entitled to exemption from tax was notice to you that your right to exemption was being questioned by the Bureau and, as G.C.M. 23688, *supra*, was first published almost six months prior to the close of 1943, it is the view of this Bureau that you were on notice that your right to exemption was at least doubtful in ample time for you to make proper provisions for the payment of any tax due for 1943 and subsequent years. Application of the ruling of September 23, 1944, to 1943 and subsequent years is therefore deemed to be both equitable and fair and it will not be disturbed. Accordingly, you will be required to file income tax returns and pay any tax shown to be due thereon for each of your taxable years beginning on or after January 1, 1943.

Very truly yours,

/s/ JOSEPH D. NUNAN, JR.,
Commissioner. [12]

EXHIBIT No. 2

Form 843 Treasury Department Internal Revenue
Service (Revised April 1940)

Copy

CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the
kind of claim filed, and fill in the certificate on the
reverse side.

☒ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Un-
used, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable
to estate or income taxes).

State of California,

City and County of San Francisco—ss:

Name of taxpayer or purchaser of stamps, Cali-
fornia State Automobile Association.

Business address, 150 Van Ness Avenue—San
Francisco 2, California.

Residence,

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named and that the facts
given below are true and complete:

1. District in which return (if any) was filed,
1st California.

2. Period (if for income tax, make separate
form for each taxable year) from January 1, 1943,
to December 31, 1943.

Exhibit No. 2—(Continued.)

3. Character of assessment or tax, Income Tax.

4. Amount of assessment, \$30,118.49; dates of payment, Sept. 14, 1945, \$27,633.38; Oct. 23, 1945, \$2,485.11.

5. Date stamps were purchased from the Government,

6. Amount to be refunded, \$30,118.49.

7. Amount to be abated (not applicable to income or estate taxes),

8. The time within which this claim may be legally filed expires, under Section 322 IRC, on September 14, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached.

/s/ CALIFORNIA STATE AUTO-
MOBILE ASSOCIATION,

By D. E. WATKINS,

Sec'y. & Gen. Mgr.

Sworn to and subscribed before me this 23rd day of October 1945.

CON T. SHEA,

(Signature of officer administering oath)

Notary Public in and for the City and County of San Francisco, State of California. [13]

STATEMENT

I.

The California State Automobile Association, with general offices at 150 Van Ness Avenue, San Francisco, California, was incorporated September 4, 1907, and until a letter addressed to it on

Exhibit No. 2—(Continued.)

September 23, 1944, by the Commissioner of Internal Revenue, had been exempt from the imposition of any Federal income taxes. That letter not only withdrew such exemption, but applied the ruling for years beginning with the calendar year 1943, notwithstanding the fact that notice of the withdrawal of such exemption was not received by the Association until the latter part of the year 1944.

This Association was originally organized as a non-profit, non-stock corporation and its main object and purpose is, and always has been, to furtherance of the pleasure and recreation of its members. Its aims as set forth in its articles of incorporation are all directed to such main purpose and all of its activities have been designed to contribute to that end.

In accomplishing the purpose for which it was organized, and for which it is now, and always has been operated, the Association provides (1) a Touring Bureau which provides the members with complete touring data and assists them in planning motor trips; (2) an Emergency Road Service Department, which makes arrangements for the rendering of emergency road service to members who encounter automobile trouble on the highways and relieves the members from the worries and anxieties which might otherwise interfere [14] with their pleasure and recreation while motoring; (3) a Road Sign Department, which operates in conjunction with State and local authorities and which benefits not only the members of the Association but the public as a whole by erecting and maintain-

Exhibit No. 2—(Continued.)

ing direction and warning signs and historical markers; (4) a Public Safety Department which carries on an active and aggressive campaign to reduce traffic accidents, eliminate traffic hazards and generally improve traffic conditions; (5) an Adjustment and Traffic Department, which advises and assists the members with respect to traffic violations and accidents; (6) a License Department which assists members in the annual renewal of automobile registration with the State Department of Motor Vehicles and obtains automobile license plates, as well as the Federal Tax Stamps now required; and (7) a Magazine Department which publishes and distributes to the members a magazine keeping them informed of motoring conditions and improvements, and specializing in travel information with respect to trips to points of interest where members will find pleasure and recreation, and which has contained no advertising material whatever for the past several years.

It is important to note that the Association itself does not maintain or operate an insurance Bureau nor does it write insurance itself, or operate a department or bureau for placing the same. Also, it does not engage in any way in financing the purchase of automobiles, nor does it engage in or operate a Department or Bureau engaging in any activity normally carried on by ordinary business organizations for profit. It is consequently neither engaged in nor in competition with commercial enterprises. Further, it does not engage in or make

Exhibit No. 2—(Continued.)

any arrangements for its members to participate in any plan by which members may obtain discounts on supplies or services of any nature whatsoever. [15]

It is also important to note that no block memberships are issued to companies or other organizations owning and operating a number of passenger motor cars, but a membership is issued in connection with the operation of each passenger car.

The main source of the Association's income is represented by the dues and initiation fees paid by its members, and any other income received has its origin either in the ownership or control of Association property and is purely an incident to said ownership, or in connection with matters incident to the furtherance and accomplishment of the main purpose for which the Association was organized, and for which it is and has been operated. All of the earnings of the Association are employed to further such main purpose and no part of the net earnings inure to the benefit of any member.

In order that there would be no occasion whatever for considering that the Association might have income of a nature which might conceivably deprive it of its tax exempt status, the Association several years ago eliminated entirely all income resulting from advertisement in its magazine, entitled "Motorland", and even refused to continue renting a garage on the rear of its property from which a small monthly rental was derived, leaving

Exhibit No. 2—(Continued.)

the garage unoccupied since that time. The Association has been most meticulous in the observance of every requirement which it conceived might be placed upon it for the maintenance of its tax exempt status.

It is believed, therefore, that the Association is definitely within the purview of Section 101 (9) of the Internal Revenue Code which provides exemption from income tax on corporations in the following language:

“Clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.” [16]

(A) The Association is a club organized exclusively for pleasure, recreation, and other non-profitable purposes.

In the Commissioner's aforesaid letter of September 23, 1944, it is stated that the opinion of the Bureau is that this Association is not a “club” within the meaning of Section 191 (9) of the Internal Revenue Code and/or corresponding provisions of prior revenue acts. This opinion appears to be based in part at least upon the decision of the District Court of the United States for the Southern District of California, Central Division, in the case of *Arner v. Rogan* (May 20, 1944, CCH P. 9567), and upon a statement that although there is no statutory definition of the term “club” as used in Section 101 (9) of the Code, it is believed that

Exhibit No. 2—(Continued.)

the term “contemplates a commingling of members, one with the other in fellowship”.

It is believed that the case of *Arner v. Rogan* has no proper application to the question at issue here, viz., whether this Association is exempt from Federal income tax, and the question of commingling of members in fellowship is in no sense required in connection with the activities of a club of this character.

It is believed further that in reaching the conclusion stated in the Commissioner's letter of September 23, 1944, there has been an unfortunate confusion of two entirely separate and distinct provisions of the Internal Revenue Code, and that one has no proper relationship to the other so far as the matter at issue is concerned.

In the first place, it should be pointed out that *Arner v. Rogan* dealt with the imposition of a tax on dues under Section 501 of the Revenue Act of 1926 as amended in 1928, the counterpart of which at present is Section 1710 of the Code which provides, so far as pertinent, as follows: [17]

“(a) Rate—There shall be levied, assessed, and paid—

“(1) Dues or membership fees.—A tax equivalent to 11 per centum of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of \$10 per year.” Emphasis supplied.)

Exhibit No. 2—(Continued.)

For purposes of comparison, Section 101 (9) of the Code is again quoted:

“Clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.”

Section 1710 of the Code is found under Chapter 10—Admissions and Dues, while Section 101 (9) is found in Chapter 1—Income Tax.

Section 1710 imposes an excise tax upon dues and membership fees of a specifically described type of club, but Section 101 (9) exempts from income tax certain designated corporations, including the clubs specified in subsection 9, within which category it is contended this Association falls.

There is, therefore, in the tax treatment of the divergent types of clubs respectively dealt with in Sections 1710 and 101 (9) no necessary or natural connection, and the descriptions of these two distinctive groups of clubs add further emphasis to the fact that they are not only not identical, but that the only thing they have in common is the generic term “club”.

There is no reference whatever in Section 101 (9) to social, athletic, or sporting clubs, which are the sole objects of taxation in Section 1710, and it is obvious from the most cursory consideration of the terms ‘pleasure’ and ‘recreation’ that both pleasure and recreation may be indulged in by persons acting individually and without any associa-

Exhibit No. 2—(Continued.)

tion whatever with other individuals. For example, one may engage in playing a game of solitaire as a means of pleasure or recreation, or one may also indulge in bicycling, fishing, or playing a game of golf by himself and derive both pleasure and recreation [18] from so doing, and in none of these instances, is association or commingling with any other individual necessary.

For the purposes of this argument, it may be admitted that the Southern California District Court was correct in holding in *Arner v. Rogan* that the Biltmore Health Club, which was there under consideration, was not a social, athletic or sporting club, and even that a commingling of members may be necessary to constitute such a club. At the same time, we vigorously deny that the same standard of definition must, or can properly be applied to an organization of the character of this Association, where commingling of members is not even in the remotest degree necessary to the pleasure and recreation of any individual member. Many other instances of indulging in pleasure and recreation, in addition to the several above referred to, might be cited where the desired pleasure and recreation is achieved by an individual entirely by himself and without the necessity of any association whatever with any other person. There are many individuals who take motor trips for pleasure or rest, to remote places to hunt, fish, hike and view scenic wonders. And this is particularly true in California where the climate makes all-year trips

Exhibit No. 2—(Continued.)

for pleasure and recreation possible. We believe it logically follows that the commingling or association of members, one with another, as in a social, athletic or sporting club, cannot be held to be a requirement in a club devoted to pleasure and recreation. For the reasons stated, we believe that the case of *Arner v. Rogan* has no application in the consideration of the case of this Association.

The Court in the *Arner* case was correct in stating that there has been no judicial definition of the words "club or organization" as used in the statute there under consideration. The Court then proceeded to say "It seems safe to say that at least there must be some sort of association or [19] cooperation between the members in an effort to reach some common objective before we may consider that there is a club or organization."

Regardless of the fact that such statement was made with reference to social, athletic or sporting clubs or organizations, with which we are not here concerned, it may be stated unequivocally that there is association and cooperation between the members of the California State Automobile Association "in an effort to reach some common objective". The whole purpose of the organization of this association was to provide, by association and cooperation among the members, for the achievement of its prime objective, namely, the pleasure and recreation of the passenger car owners constituting its membership, by the improvement and marking of roads, obtaining legislation to further the construc-

Exhibit No. 2—(Continued.)

tion of more and better highways, furnishing travel information and guidance to its members, etc. In that connection, it might be pointed out that this Association has a Board of Directors made up of 21 members which meets regularly every month throughout the year with the exception of the month of July, when there is no meeting due to the usual vacation period, and that each year the Board of Directors appoints 10 committees, made up of from 5 to 9 members each, the names of which committees are as follows: Executive Committee, Finance Committee, Legislative Committee, Good Roads Committee, Emergency Road Service Committee, Public Safety Committee, Membership Committee, Publicity Committee, Transcontinental Highway Committee, and Forestry Committee. The 21 Directors of the Association serve without compensation, but give considerable time to their duties as such Directors.

In the earlier days of motoring when this Association was conceived as a motor club in 1907 by a half dozen men, it was their enthusiasm for motoring as a means of pleasure and recreation that prompted them to give their time to the development of good roads, and the other purpose of the Association and since that time all succeeding Directors have been prompted [20] by the same idea in contributing their time without compensation in connection with their attendance at the monthly meetings of the Board and the interim meetings of the various committees, all to the end of improving road conditions and other facilities in connec-

Exhibit No. 2—(Continued.)

tion with motoring to make this form of recreation more pleasurable.

The Committees above-named not only have meetings of their own, but in many cases there is frequent contact by individual members with the chairmen of the respective Committees, so that there is almost constant association between members for the furtherance of the primary purposes for which the Association was organized, i.e., the pleasure and recreation of its members.

Consequently, even adopting the criterion applied to an entirely separate and different section of the Internal Revenue Code (1710) by the Court in *Arner v. Rogan*, it seems clear that this Association falls within the above quoted definition by the Court in that case of a "club".

As set forth in 25 Ruling Case Law, 45 et seq. the word "club" has no very definite meaning. However, clubs are formed for all sorts of purposes and there is naturally no uniformity in either their constitution or rules, but although the word "club" does not have a very definite meaning, it does of course have some meaning, and reference to Ruling Case Law supra, 11 Corpus Jur. 922, and note 1, 4 American Jurisprudence 456 et seq., and Websters New International Dictionary, 2nd Edition, Unabridged, reveals that a club is "any association of persons who have joined together for a certain object." Webster set forth among other definitions of the word "club" the following:

"To unite for a common end, or contribute to a common stock; as to club exertions."

Exhibit No. 2—(Continued.)

* * * *

Intransitive: "To form a club; to combine for the promotion of some common object; to unite." [21]

In so far as the Association is concerned, there can be no doubt that the members "combined for the promotion of some common object" and that such common object was the creation, improvement and maintenance of conditions and the dissemination of information, including maps, which would materially contribute to the pleasure and recreation of passenger car users, who were members of the Association, and which could be accomplished only by their combining together in the form of a club. Such object could not possibly be attained through the efforts of unassociated individuals.

It is hardly open to argument that concern over possible breakdowns on a highway, traffic conditions, proper routing, and possible consequences resulting from unexpected mishaps, etc. are not compatible with pleasure and recreation, nor is it open to argument that one individual or numerous individuals acting separately could do little, if anything, to improve conditions, to collect and distribute information covering large geographical areas, so as to further the pleasure and recreation of owners of passenger cars. The only solution for individuals desirous of using their passenger cars under conditions which would materially contribute to their pleasure in motoring, would be to join to-

Exhibit No. 2—(Continued.)

gether and as a group, association, or club, accomplish what otherwise would be beyond reach.

This the members of the Association have done, and accordingly it is maintained that this Association, consisting of persons who have joined together for the principal purpose of furthering the pleasure and recreation they derive from motoring, is a club organized exclusively for pleasure, recreation and other non-profitable purposes, within the purview of Section 101 (9) of the Code. [22]

(B) The Association is operated exclusively for pleasure and recreation and other non-profitable purposes.

Not only was the Association organized for the purpose stated, but a review of its activities, as set forth herein, establishes that such activities were conducted with but one end in view, namely, furtherance of the primary purpose, pleasure and recreation, for which the Association was organized and that as a practical matter, it was operated not only for the pleasure and recreation of its own members, but incidentally and inescapably for a similar non-profitable purpose, the benefit of the motoring public as a whole, which benefit naturally flowed from the activities of the Association on behalf of its members and which should, of course, in no degree affect the tax exempt status of the Association.

As will be demonstrated, the mere fact that the Association may realize some small incidental income from sources other than dues and initiation

Exhibit No. 2—(Continued.)

fees of its members, has no bearing upon its tax exempt status, inasmuch as the realization of such income is merely incidental to activities in pursuit of the accomplishment of the main purpose for which the Association was organized and is operated.

The Association and the Inter-Insurance Bureau, the latter an entirely separate organization, jointly occupy the headquarters of the Association at 150 Van Ness Avenue, San Francisco, California, and the Bureau reimburses the Association by the payment of rent for the space it occupies, based entirely upon its proportionate share of expenses covering the operation and maintenance of the building at that address. It is estimated that the Bureau occupies approximately two-thirds of the building and it is accordingly charged with such proportion of the cost of maintenance and operation. It should be emphasized, however, that this is merely an allocation of costs, and that the [23] Association derives no amount whatever as profit from the payment of such rent. There is likewise a reimbursement by the Bureau to the Association of the Bureau's proportionate share of certain other services which are used jointly by both organizations, such as, for example, salaries of the Purchasing Agent and Assistant, Storeroom, Mailing Department, Telephone and Switchboard, Lunch Room, Nurse and Tube Operators. It has been found that each of these two organizations, which are entirely separate and distinct entities, can jointly utilize the

Exhibit No. 2—(Continued.)

services of certain employees, resulting in a saving to each organization, and the proportionate parts of such salaries and expenses are accordingly charged to the Association and the Bureau, respectively, and when paid by the Association entirely are proportionately reimbursed by the Bureau. Again, there is no element of profit whatever involved in the payment of such expenses by the Bureau to the Association.

In the "Statement Regarding Activities of California State Automobile Association" furnished the Commissioner of Internal Revenue in September, 1941, and signed and sworn to by D. E. Watkins, Secretary of the Association, it is stated on page 8 thereof, that the only income received from non-members consisted of advertising in its magazine and a reimbursement from State and local authorities of the cost price of road sign material, and the rental of property for \$125 per month. In that connection, you are informed that no advertising revenue has been derived from the magazine "Motorland" since January 1, 1942, and since that date no advertising whatever has been accepted.

The rental of property at \$125 per month represents rental paid for the use of the garage on the premises of the general offices at 150 Van Ness Avenue, but the last rental for such garage was paid on October 3, 1941, and the garage has not been rented since that time, and has therefore completely ceased to be a source of income. [24]

With respect to the reimbursement by State and

Exhibit No. 2—(Continued.)

local authorities of the cost price of road sign material, it is stated on page 6 of the above-mentioned Statement that such reimbursement for the year 1940 amounted to \$100,248.18, and that the Association's expense, which it paid out of its own funds, for erecting and maintaining said signs for the year 1940, amounted to \$69,073.25. In that connection, it should be observed that the latter amount represents the sum expended by the Association over and above the amount of \$100,248.18, which was reimbursed to it by the State and the various cities and counties within the area in which it operates, so that the total amount expended for that year by the Association was approximately \$169,000, of which the Association was reimbursed only \$100,248.18. Obviously, there was not only no profit involved in that transaction, but an actual outlay of nearly \$70,000, with no reimbursement whatever, by the Association which constituted one of the services rendered its members with the objective of increasing their pleasure and recreation in motoring.

Attention is also invited to the fact that during the year 1943 there were approximately 153 officially designated hotels under contract with the Association and that during that year the Association received only \$129.15 for its endorsement of these hotels and although the receipt of this small amount, while actually taken in 1943, was really chargeable against endorsements in 1942. In 1944 the list of such hotels had dropped to 141, but

Exhibit No. 2—(Continued.)

no endorsement fees were charged in 1944 and none received. The association received \$265.00 in 1943 and \$275.00 in 1944 for endorsement of official garages.

A number of decided cases have held that the receipt of incidental income, even in some instances where the amounts were quite large, is not sufficient to destroy the tax exempt status of an organization otherwise [25] entitled thereto. In fact, the Supreme Court of the United States in *Trinidad v. Sagrada*, 263 U.S. 578, pointed out in a somewhat similar case that the statute says nothing about the source of the income, but makes its destination the ultimate test of exemption. That principle of law has been cited and followed by a number of Federal Courts in cases involving the application of Section 101 (9) of the Code. Applying that principle to this case, your attention is again invited to the sworn statement of Mr. Watkins in 1941, in which, on page 7, he made the following statements:

“Disposition of Income: The entire income of the Association is used to carry out the purposes recited in its Articles of Incorporation and to render to its members the various services previously enumerated. No distributions of income has ever been made to members nor does any profit inure to the benefit of any individual.”

The foregoing statement is as true today as when it was made and no profit will at any time inure to the benefit of any individual.

Exhibit No. 2—(Continued.)

A number of cases, as above indicated, have been litigated in the Federal Courts dealing with the exact question of the tax exempt status of such organizations under the revenue laws, and the Courts have repeatedly reached the conclusion that where the receipt of income was purely incidental to the main purpose of the organization in question, such fact was not sufficient to disturb the right to such exemption.

One of the outstanding cases of this type is *Koon Kreek Klub v. Thomas, et al.*, 106 F. 2d. 616, decided by the 5th Circuit Court of Appeals.

In that case the appellant was organized as a fishing and hunting club, maintaining a club house, boats, and fishing and game preserves for the pleasure and amusement of its members, and it acquired a tract of land containing 6777 acres, which completely surrounded a tract of 340 acres owned and occupied by one Thomas. It granted grazing privileges to Thomas for a consideration of \$500 per year, and for a certain period extended [26] similar privileges to its manager for \$100 per year. Prior to the tax years before the Court, the club received income from dues which averaged \$12,500 per year. Oil was later discovered about 7 miles from the club property and in 1934, one of the years under consideration, the club granted an oil lease on its entire property for a consideration of \$4.00 per acre, with an annual renewal rental of \$1.00 per acre, reserving the usual royalties. The lease was not renewed, however, and the amount received, which exceeded \$25,000, was used to reduce or retire a mortgage which had been outstanding

Exhibit No. 2—(Continued.)

against the property since its acquisition by the club.

The Court found that the question of tax liability turned upon the interpretation of Section 101 (9) of the Revenue Act of 1934, and held that whatever financial gain was realized from the grazing and leasing activities was incidental to and directed toward the accomplishment of the purpose upon which the income tax exemption was based.

The Court continued:

“The contention that the club did not operate exclusively for non-profitable purposes because of the leases of grazing rights is equally without foundation. In order to maintain its houses and preserves, it was required to raise funds from some source. That these funds might be derived from a use of the properties themselves, not inconsistent with the purposes for which they were maintained, would not change the nature of the operation any more than an increase in dues charged to members. Indeed, if the club could be made self-sustaining by grazing fees, guest fees and other prerequisites, its operations being for the stated purposes, its exempt status would not be affected. We need but to extend this principle to the acquisition of the preserves themselves to demonstrate that the granting of oil leases to obtain money with which to pay the mortgage debt did not change the character of the organization.”

Exhibit No. 2—(Continued.)

* * * *

“We think the question is controlled by the decision in Trinidad v. Sagrada Orden, 263 U.S. 578, 44 S. Ct. 204, 68 L. Ed. 458, wherein the court points out that the statute says nothing about the source of the income, but makes its destination the ultimate tests of exemption. The act here involved provides [27] exemption for ‘clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings or which inures to the benefit of any private shareholder,’ while the statute before the Supreme Court provided exemption for corporations ‘organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual.’ The necessity of having money to carry on the enterprise, whether charitable or recreational, is present in both cases. Deriving funds from the properties owned to further either of these ends would be no more a departure in one case than in the other.’”

(Emphasis supplied.)

Likewise, it was held in The Goldsby King Memorial Hospital, a Corporation, v. Commissioner, CCH. Dec. 14042 (M) that a corporation otherwise exempt is not deprived of exemption be-

Exhibit No. 2—(Continued.)

cause it incidentally carries on a profitable activity in furtherance of its predominant charitable purpose.

In *Anderson Club Inc., v. Commissioner of Internal Revenue*, 2 T.C. 1238, petitioner was incorporated under the Indiana Business Corporations Act in 1921 to act as the successor to an unincorporated association formed in 1902 for the purpose of constructing and operating a golf course and country club. The golf course and club house were located on a tract of land leased by the association. Upon the expiration of the lease the owners of the land demanded such an increase in rental upon renewal that it was decided to buy the land. It was necessary to buy the entire tract, including some acreage which proved to be unsuitable for a golf course. Petitioner's attempts to sell this unusable acreage as a whole being unsuccessful, it was sold over a period of years by small tracts at considerably in excess of cost. The profits on the sales amounted to about \$20,000 in two years, and all of such profit was required by the terms of the mortgage to be used, and was used, to reduce the mortgage and bonded indebtedness of the club. The club also conducted a "Winter Club" in downtown Anderson and profits of approximately \$3,000 were derived from this activity in the same two years. In [28] holding the club exempt under Section 101 (9), the Tax Court referred to the fact that the Commissioner's "regulations recognized the fact that an incidental sale of property does not extin-

Exhibit No. 2—(Continued.)

guish the right to exemption;" that "the fact that the profits were in some years substantial does not affect the incidental nature of the sales," and referred to *Koon Kreek Klub v. Thomas*, *supra*, and *Santee Club v. White*, 87 Fed. (2d) 5, where the incidental revenue under consideration was quite substantial, but in each of which cases, as stated by the Tax Court, the club was held to be exempt. The Court further held that the activities of the "Winter Club" were not such as to deprive petitioner of its exempt status.

It was also held in *Town and Country Club v. Commissioner*, (CCH Dec. 12924-A, December 30, 1942) where the petitioner purchased property to serve as a club house in downtown San Francisco, at 218 Stockton Street, and rented two stores on the ground floor, that such profit-making activities did not preclude the corporation from exemption under Section 101 (9) of the Code. In that case again reference was made to the *Trinidad v. Segrada* case, *supra*, decided by the Supreme Court of the United States, and it was pointed out that since that decision "it has been consistently held that it is not the source of the corporation's incidental profits that is controlling, but their destination which controls exemption from tax".

In *Roche's Beach, Inc., v. Commissioner of Internal Revenue*, 96 F. (2d) 776 the 2nd Circuit Court of Appeals held, with reference to a corporation organized for charitable purposes, that to come within the exemption, an otherwise exempt corporation is not precluded from engaging in busi-

Exhibit No. 2—(Continued.)

ness activities for profit, and that the destination, the exempt purpose, is more significant than the source of the income.

The First Circuit Court of Appeals also held in *Santee Club v. White*, 87 F. (2d) 5, above referred to, that profitable transactions [29] incidental to the main non-profitable purpose and activities of an organization do not affect the non-profitable character of the organization.

Again in *Schofield v. Corpus Christi Golf and Country Club*, 127 F. (2d) 452, the 5th Circuit Court of Appeals held the fact that the taxpayer, a golf and country club, had executed an oil lease on its property and received sums as royalties and bonus under the lease, did not preclude taxpayer from being a "club organized and operated exclusively for non-profitable purposes" within the terms of Sec. 101 of the Code, where the taxpayer's operations were the same before and after the lease and none of the net earnings inured to the benefit of any private shareholder. There the revenues from oil operations were quite substantial. The plaintiff leased property to the Taylor Refining Company for a cash bonus of \$7,500, an oil payment of \$60,000 out of a certain part of the oil, and a royalty in addition thereto. The Court there said:

"The statute expressly gives the exemption to clubs operated as this one was and as long as the exemption holds, all revenues of the club without regard to their source, are exempt from tax, because under the statute it is the nature and character of the operations of

Exhibit No. 2—(Continued.)

the club and the use made of the revenues, and not their source, which determines the exemptions. The judgment was right. It is affirmed.”

(Emphasis supplied.)

(C) No part of the Association's net earning inures to the benefit of any private shareholder.

No part of the Association's net earnings have ever been distributed to any of its members, and inasmuch as it has been held (see *Koon Kreek Klub v. Thomas et al.*, *supra*) that so long as profits “are retained by the organization or used to further the purposes which are made the basis of exemption and are not otherwise used for the benefit of any private shareholder * * *,” such profit cannot be deemed to inure to the benefit of any private shareholder, it follows that, under the facts stated, no part of this Association's net [30] earnings inures to the benefit of any private shareholder.”

(D) California State Automobile Association Inter-Insurance Bureau.

The California State Automobile Association Inter-Insurance Bureau is not a part or a subsidiary of the California State Automobile Association, but is an entirely separate and distinct organization and entity. This Bureau was formed and is operated, in their own particular behalf, by a group of Association members for the purpose of providing indemnity among themselves, i.e., the subscribers to the Bureau, who desire to protect themselves against various automobile hazards, the exchange of indemnity being effected by an agent holding

Exhibit No. 2—(Continued.)

a power of attorney for that purpose from each individual in the group.

The Association and the Bureau, each with its own staff of employees, occupy common quarters and share the expense of same. They also share certain other expenses when, for convenience, an employee of one organization also performs services for the other. It cannot be too strongly emphasized, however, that neither organization derives any profit from the operation of the other.

The Inter-Insurance Bureau is itself a non-profit concern. Its funds, consisting of the accumulated premium deposits of its subscribers belong solely to them, and interest earned thereon accrues to their several accounts.

A special accident policy written and issued exclusively for members of the Automobile Association with the North American Insurance Company is issued to such members, and the premiums on said policies are paid out of membership dues; and to further assist the members in obtaining reliable insurance coverage on their automobiles, the Association has arrangements with the Inter-Insurance [31] Bureau, which Insurance Bureau under its rules and regulations writes insurance only for those members of the Automobile Association who desire it. At the present time, approximately 65% of the members of the Association carry insurance with the Bureau, but it should be emphasized that no member is required to insure with the Bureau, and any member may insure with any insurance company of his own choice.

Exhibit No. 2—(Continued.)

About two-thirds of the members of the Automobile Association have chosen to become subscribers to the Bureau by insuring with it, but the remaining members of the Association prefer to obtain their automobile insurance from other reciprocal, mutual, or stock insurance companies. It should also be pointed out that the premiums or rates charged to policy holders of the Inter-Insurance Bureau are the same as those charged by what are known as the Board or Conference companies, they being the standard rates which are of course, higher than those of many of the independent companies but are lower than none, so that those members of the Association who are also subscribers to the Bureau do not obtain any discount on insurance rates. Being a reciprocal company, it is the practice to pay back to policy holders after the expiration dates of the respective policies, a proportionate share of any savings which may be obtained during that policy year. However, this is the customary practice followed by all reciprocal or mutual insurance companies, and no unusual benefits are therefore derived by members who take out their policies with the Inter-Insurance Bureau.

(E) The California State Automobile Association is different in many essential respects from the M Association described in G.C.M. No. 23688.

This Association is wholly unlike the Automobile Association dealt [32] with in G.C.M. 23688, which is stated to function as a federation of automobile clubs and a managing agency of several local auto-

Exhibit No. 2—(Continued.)

mobile clubs. This Association does not conduct or participate in any such functions, nor does it organize, supervise, or grant affiliation to other corporations, associations, or organizations with similar objects and purposes, as described in (f) of the by-laws of M Association. It has no member clubs and has never been operated as a federation of automobile clubs.

It is sharply distinguished from the M Association also in that members may not purchase insurance "at a considerable saving in premiums", nor does it bear any resemblance whatsoever to the organization described in G.C.M. 23688 whereby "Arrangements have also been made with certain merchants in one area whereby members of one of the local organizations may purchase clothing, laundry, furniture, and automobile supplies at less than the usual selling prices of such articles."

Another difference between this Association and the M Association is that in the latter, individual members as such have no right to vote or participate in the affairs of the corporation, whereas in our Association the individuals have both of such rights, and do actively participate in the affairs of the corporation. Likewise, our Association, unlike the M Association, does consist of members who participate in activities leading to the rendition of the services previously herein enumerated, all of which are designed to and do contribute to the pleasure and recreation of the membership.

Again, there is a radical difference between the M Association, which is stated in G.C.M. 23688

Exhibit No. 2—(Continued.)

to operate “in the nature of a non-profit cooperative buying association,” as the California State Automobile Association indulges in no such activities whatever. Members of this Association [33] are not able, as the members of the M Association are, to make certain purchases at less than market price, nor are they able to obtain insurance coverage at reduced premium costs.

A comparison of the activities of our Association show it to be widely divergent from the M Association in practically every respect. [34]

CONCLUSION

It is respectfully submitted that under the definitions hereinabove cited, the Association is clearly a “club” within the purview of Section 101 (9), and that it is organized and operated exclusively for pleasure, recreation, and other non-profitable purposes. It is unquestionably true that the members of this Association are banded together to enjoy the benefits resulting from the collective action of the large membership in constantly extending and improving motoring conditions throughout the northern part of California, and furnishing its members information and advice concerning such conditions, and that this, contrary to the statement made in the Commissioner’s letter of September 23, 1944, *supra*, is the common objective of the Association in which all members participate. The Association is in no sense whatever a cooperative, was not organized and is not operated as a cooperative, and furnishes none of the discounts and sav-

Exhibit No. 2—(Continued.)

ings which are customarily available to members of a cooperative.

The primary rule in the construction of a statute is to ascertain and give effect to legislative intention. *Fidelity and Deposit Co. of Maryland v. Arenz*, 290 U. S. 66. And, in ascertaining and giving effect to such intention, the words used in the statute are to be given their common, ordinary meaning in the absence of contrary indication either in the statute or surrounding circumstances. *Van Weise v. Commissioner of Internal Revenue*, 69 Fed. (2d) 439 cert. den. 54 S. Ct. 866, 292 U. S. 655.

A very exhaustive search and study of relevant cases, including those cited in *Arner v. Rogan*, *supra*, has failed to reveal a single decision which might be construed as holding that a "club" in the general sense and distinguished from clubs which have a social, athletic, or sporting purpose, contemplates the commingling of members in fellowship. [35]

As previously pointed out, Section 101 (9) makes no mention whatever of social, athletic, or sporting activities, and the innate characteristic of social, athletic or sporting clubs must not be confused with the characteristics inherent in clubs generally. Clubs may have an infinite variety of purposes, none of which contemplate a commingling of their members. The characteristic common to all clubs, properly so-called, is the association of individuals to reach a common objective, and it is this char-

Exhibit No. 2—(Continued.)

acteristic which controls the proper meaning of the term “club” and gives it its generally accepted meaning, to wit, an association of individuals who “combine for the promotion of some common object”. It is this common, ordinary meaning which should be applied in the interpretation of Section 101 (9).

It seems inescapable, therefore, that this Association must be held to be a club within the purview of Section 101 (9). The Association is composed of individuals who are associated together for the furtherance of pleasure and recreation through motoring. Commingling of persons is not inherent or necessary to pleasure and recreation (see *supra*) and the members give effect to their association through the Board of Directors elected by them, and through the numerous committees hereinbefore enumerated which carry on the affairs of the Association for the common good of all the members. It would be difficult to find a more outstanding example of an association for the achievement of a common purpose, in order to illustrate the proper definition of the word “club” in its generally accepted sense.

With regard to the contention in the Commissioner’s letter of September 23, 1944, that the Association’s principal activity is the “rendering to members upon payment of an annual fee, services of the type available to motorists generally on a commercial scale at greater cost,” it cannot be too strongly emphasized that such contention utterly

Exhibit No. 2—(Continued.)

disregards the purpose [36] for which the Association is organized and operated, and upon which exemption is predicated. The sole purpose for which the Association is organized and operated is the pleasure and recreation of its members and other non-profitable purposes, and it cannot be gainsaid that the provision by the Association for emergency road service, lists of accredited garages, hotels and other stopping places for the comfort and convenience of its members, furnishing maps, routings and general motoring information, all directly contribute to their pleasure and recreation. All the Association's activities are incidental to this sole purpose and are engaged in with but one end in view, namely, the achievement of said purpose. The Association is neither organized nor operated for the purpose of rendering services of a commercial nature to its members, and the great majority of such services are not obtainable commercially at greater cost or at any cost. There is no commercial organization qualified or equipped to furnish touring information and comparable advice to motorists, at least in the section served by this Association, so that the services primarily desired by motorists in such section cannot be obtained from any commercial organization.

As previously pointed out the Association can in no way be compared to a non-profit cooperative buying association, which is organized and operated for the purpose of rendering services of a commercial nature to its members, with attendant discounts or savings in costs.

Exhibit No. 2—(Continued.)

The activities of the Touring Bureau of the Association reflect most graphically the use made by the Association's membership of the facilities set up for their pleasure and recreation, which is its primary function.

The following excerpt from the Report of the President of the Association for 1940, in which year pleasure and recreational trips were [37] still on practically a normal basis, is highly illustrative:

“The record-breaking flow of motor travel in California and throughout the entire west last year was strongly reflected in activities of your Association's Touring Bureau, Volume of service again demonstrated that the bureau is most widely used of any agency in the entire west for the guidance and planning of motor tours. During the year Touring Bureau staffs in Association offices personally served 199,126 motor touring parties, including members of affiliated A.A.A. clubs who came in record numbers to visit the Exposition and tour California, other western states, and western Canada. The bureau prepared 19,112 transcontinental routings, and 30,256 other out-of-state routings. Road maps issued totalled 367,270. In addition to these personally rendered services, the bureau handled 170,201 telephoned requests from members seeking travel information, exclusive of thousands of such inquiries received by San Francisco headquarters and

Exhibit No. 2—(Continued.)

not tabulated. The Bureau issued 24,870 tourist court and cabin lists and 44,000 monthly hotel and resort lists. Foreign travel was affected by conditions abroad, yet the bureau handled shipment of 35 cars for members making European tours and arranged for driving licenses and other documents.”

The real purpose for which the Association is organized and operated should therefore control, in conformity with the provisions of Section 101 (9). And inasmuch as the sole purpose for which the Association is organized and operated falls squarely within the said subsection, we respectfully submit that the Association is entitled to exemption from Federal income tax as “a club organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.”

It is believed that all the conditions of the statute have been met by this Association, which may be unique in that respect, and that it is entitled to the restoration of its tax exempt status effective as of January 1, 1943. [38]

II.

As stated on a rider attached to the corporation income tax return for the calendar year 1943, and an identical rider attached to the corporation excess profits tax return for the calendar year 1943, which returns were filed by the Association with the Collector of Internal Revenue at San Francisco

Exhibit No. 2—(Continued.)

on September 14, 1945, the preparation and filing of the said returns resulted from instructions received from the Commissioner of Internal Revenue in his letter dated July 27, 1945, and that the filing of said returns and the payment of the taxes shown thereon were made under protest as the taxpayer believes it is rightfully entitled to tax exemption. On the aforesaid date of filing said returns, taxpayer paid income taxes for 1943 in the amount of \$27,633.38 and on October 23, 1945, interest in the amount of \$2,485.11, making a total of \$30,118.49 and on September 14, 1945, the claimant paid excess profits taxes in the amount of \$129,178.22 and on October 23, 1945, interest of \$11,617.19 making a total of \$140,795.41.

III.

Claimant respectfully requests and demands that the sum of \$27,633.38, representing income taxes together with interest thereon in the amount of \$2,485.11 paid for the calendar year 1943 be refunded together with interest as provided by law, for the reasons hereinabove set forth. Coincident with the filing of this Claim for Refund, a similar request and demand is being made for the refund of excess profits taxes in the amount of \$129,178.22, together with interest thereon in the amount of \$11,617.19.

IV.

Claimant requests and demands such further or additional refund or [39] refunds as may now or hereafter appear to be due it by reason of the fore-

Exhibit No. 2—(Continued.)

going or on account of (a) any mistake in fact or in law made by it or any officer, clerk or other employee of the Treasury Department in the preparation, amendment and/or adjustment of the said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee of the Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law, whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered. [40]

EXHIBIT No. 3

Form 843, Treasury Department, Internal Revenue Service, (Revised April 1940)

CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[X] Refund of Tax Illegally Collected.

[] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Exhibit No. 3—(Continued)

[] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California,

City and County of San Francisco—ss.

Name of taxpayer or purchaser of stamps California State Automobile Association.

Business address 150 Van Ness Avenue, San Francisco 2, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was led 1st California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1943, to December 31, 1943.

3. Character of assessment or tax, excess profits tax.

4. Amount of assessment, \$140,795.41; date of payment, Sept. 14, 1945, \$129,178.22; Oct. 23, 1945, \$11,617.19.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$140,795.41.

7. Amount to be abated (not applicable to income or estate taxes)

8. The time within which this claim may be legally filed expires, under Section 322 IRC, on September 14, 1948.

Exhibit No. 3—(Continued)

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached.

/s/ CALIFORNIA STATE
AUTOMOBILE ASSN.,

By D. E. WATKINS,
Sec'y & Gen. Mgr.

Sworn to and subscribed before me this 23rd day
of October, 1945.

CON T. SHEA,

Notary Public in and for the City and County of
San Francisco, State of California. [41]

[Clerk's Note: Statement attached to Exhibit
No. 3 is identical with Exhibit No. 2 reproduced
at page 21, except for paragraphs II and III
appearing on pages 52 and 53. Paragraphs II
and III of Exhibit No. 3 are here set forth:]

II.

As stated on a rider attached to the corporation
income tax return for the calendar year 1943, and
an identical rider attached to the corporation ex-
cess profits tax return for the calendar year 1943,
which returns were filed by the Association with
the Collector of Internal Revenue at San Francis-
co on September 14, 1945 the preparation and filing
of the said returns resulted from instructions re-
ceived from the Commissioner of Internal Revenue
in his letter dated July 27, 1945, and that the filing
of said returns and the payment of the taxes there-
on were made under protest as the taxpayer be-
lieves it is rightfully entitled to tax exemption. On

Exhibit No. 3—(Continued)

the aforesaid date of filing said returns taxpayer paid income taxes for 1943 in the amount of \$27,-633.38 and on October 23, 1945 interest in the amount of \$2,485.11 making a total of \$30,118.49 and on September 14, 1945 the claimant paid excess profits taxes in the amount of \$129,178.22 and on October 23, 1945 interest of \$11,617.19 making a total of \$140,795.41.

III.

Claimant respectfully requests and demands that the sum of \$129,178.22, representing excess profits taxes together with interest thereon in the amount of \$11,617.19 paid for the calendar year 1943 be refunded together with interest as provided by law, for the reasons hereinabove set forth. Coincident with the filing of this Claim for Refund a similar request and demand is being made for the refund of income taxes in the amount of \$27,633.38 together with interest thereon in the amount of \$2,-485.11.

* * * *

[66]

EXHIBIT No. 4

Form 843, Treasury Department, Internal Revenue Service, (Revised April 1940).

Copy

CLAIM

To Be Filed With the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[X] Refund of Tax Illegally Collected.

[] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California,

City and County of San Francisco—ss.

Name of taxpayer or purchaser of stamps, California State Automobile Association.

Business address, 150 Van Ness Avenue, San Francisco 2, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, 1st California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1944, to December 31, 1944.

3. Character of assessment or tax, Income Tax.

4. Amount of assessment, \$37,947.20; dates of payment, Sept. 14, 1945, \$36,844.39; Oct. 23, 1945, \$1,102.81.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$37,947.20.

7. Amount to be abated (not applicable to income or estate taxes)

8. The time within which this claim may be

legally filed expires, under Section 322 IRC, on Sept. 14, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached.

/s/ CALIFORNIA STATE
AUTOMOBILE ASSN.,
By D. E. WATKINS,
Sec'y. & Gen. Mgr.

Sworn to and subscribed before me this 23rd day of October, 1945.

CON T. SHEA,
Notary Public in and for the City and County of
San Francisco, State of California. [68]

[Clerk's Note: Statement attached to Exhibit No. 4 is identical with Exhibit No. 2 reproduced at page 21, except for paragraphs II and III appearing on pages 52 and 53. Paragraphs II and III of Exhibit No. 4 are here set forth:]

II.

As stated on a rider attached to the corporation income tax return for the calendar year 1944, and an identical rider attached to the corporation excess profits tax return for the calendar year 1944, which returns were filed by the Association with the Collector of Internal Revenue at San Francisco on September 14, 1945, the preparation and filing of said returns resulted from instructions received from the Commissioner of Internal Revenue in his letter dated July 27, 1945, and that the filing of said returns and the payment of the taxes shown thereon were made under protest as the taxpayer

believes it is rightfully entitled to **tax exemption**. On the aforesaid date of filing said returns, taxpayer paid income taxes for 1944 in the amount of \$36,844.39 and on October 23, 1945 interest in the amount of \$1,102.81, making a total of \$37,947.20 and on September 14, 1945 the claimant paid excess profits taxes in the amount of \$23,306.42 and on October 23, 1945 interest of \$697.60 making a total of \$24,004.02.

III.

Claimant respectfully requests and demands that the sum of \$36,844.39, representing income taxes, together with interest thereon in the amount of \$1,102.81 paid for the calendar year 1944 be refunded together with interest as provided by law, for the reasons hereinabove set forth. Coincident with the filing of this Claim for Refund a similar request and demand is being made for the refund of Excess Profits Taxes in the amount of \$23,306.42, together with interest thereon in the amount of \$697.60.

* * * *

[94]

EXHIBIT No. 5

Form 843, Treasury Department, Internal Revenue Service, (Revised Jan. 1946).

Copy

CLAIM

To Be Filed With the Collector Where
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[X] Refund or Tax Illegally Collected.

[] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[] Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

City and County of San Francisco—ss.

Name of taxpayer or purchaser of stamps, California State Automobile Association.

Business address, 150 Van Ness Avenue, San Francisco 2, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, 1st California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1944 to December 31, 1944.

3. Character of assessment or tax, Excess-profits tax.

4. Amount of assessment, \$24,004.02; dates of payment, Sept. 14, 1945, \$23,306.42; Oct. 23, 1945, \$697.60.

5. Date stamps were purchased from the Government

6. Amount to be refunded, \$24,004.02.

7. Amount to be abated (not applicable to income, gift, or estate taxes)

8. The time within which this claim may be legally filed expires, under section 322 IRC on September 14, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached.

CALIFORNIA STATE
AUTOMOBILE ASSN.,

/s/ By D. E. WATKINS,
Sec'y. & Gen. Mgr.

Sworn and subscribed to before me this 23rd day of October, 1945.

CON T. SHEA,

Notary Public in and for the City and County of San Francisco, State of California. [96]

[Clerk's Note: Statement attached to Exhibit No. 4 is identical with Exhibit No. 2 reproduced at page 21, except for paragraphs II and III appearing on pages 52 and 53. Paragraphs II and III of Exhibit No. 5 are here set forth:]

II.

As stated on a rider attached to the corporation income tax return for the calendar year 1944, and an identical rider attached to the corporation excess profits tax return for the calendar year 1944, which returns were filed by the Association with the Collector of Internal Revenue at San Francisco on September 14, 1945, the preparation and filing of said returns resulted from instructions received from the Commissioner of Internal Revenue in his letter dated July 27, 1945, and that the filing of said returns and the payment of the taxes shown

thereon were made under protest as the taxpayer believes it is rightfully entitled to tax exemption. On the aforesaid date of filing said returns, taxpayer paid income taxes for 1944 in the amount of \$36,844.39 and on October 23, 1945, interest in the amount of \$1,102.81, making a total of \$37,947.20, and on September 14, 1945, the claimant paid excess profits taxes in the amount of \$23,306.42 and on October 23, 1945, interest of \$697.60, making a total of \$24,004.02.

III.

Claimant respectfully requests and demands that the sum of \$23,306.52, representing excess profits taxes, together with interest thereon in the amount of \$697.60 paid for the calendar year 1944, be refunded, together with interest as provided by law, for the reasons hereinabove set forth. Coincident with the filing of this Claim for Refund, a similar request and demand is being made for the refund of income taxes in the amount of \$36,844.39, together with interest thereon in the amount of \$1,102.81.

* * * *

[122]

[Endorsed]: Filed May 26, 1948.

[123]

[Title of District Court and Cause.]

ANSWER

Defendant answers as follows:

I.

Admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Admits the allegations contained in paragraph II of plaintiff's complaint.

III.

Admits the allegations contained in paragraph III of plaintiff's complaint.

IV.

Admits the allegations contained in paragraph IV of plaintiff's complaint.

V.

Admits the allegations contained in paragraph V of plaintiff's complaint, except denies that the taxes were paid on September 14, 1945, and avers that the taxes were paid on October 15, 1945, [124]

VI.

Defendant admits that the taxes of \$27,633.38 were paid but denies that the taxes were paid on September 14, 1945, and avers that the taxes were paid on October 15, 1945; admits that interest of \$2,485.11 was paid on October 23, 1945; denies that the taxes and interest, or any part thereof, were illegally collected and denies that any part thereof is due and owing to the plaintiff. Defendant avers that he is without knowledge or information sufficient to form a belief as to the truth of the remaining allegation contained in paragraph VI of plaintiff's complaint.

VII.

Denies all the allegations contained in paragraph VII of plaintiff's complaint, except admits that Section 101 (9) of the Internal Revenue Code contains the provisions alleged.

VIII.

Denies all the allegations contained in paragraph VIII of plaintiff's complaint.

IX.

Answering paragraph IX of the complaint defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

X.

Answering paragraph X of the complaint defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

XI.

Denies all the allegations contained in paragraph XI of plaintiff's complaint.

XII.

Admits the allegations contained in paragraph XII of plaintiff's complaint, except denies that any portion of the taxes or [125] interest was erroneously or illegally collected.

XIII.

Denies all the allegations contained in paragraph XIII of plaintiff's complaint.

XIV.

The allegations of paragraph XIV are admitted, except insofar as denied in paragraph V of this answer.

XV.

All of the allegations contained in paragraph XV of the complaint are denied, except as heretofore admitted. Defendant admits that interest of \$11,-617.19 was paid on October 23, 1945.

XVI.

Admits the allegations contained in paragraph XVI of plaintiff's complaint, except denies that the taxes and interest, or any portion thereof, were erroneously or illegally collected.

XVII.

Denies all the allegations contained in paragraph XVII of plaintiff's complaint.

XVIII.

Admits the allegations contained in paragraph XVIII of plaintiff's complaint, except insofar as denied in paragraph V of this answer.

XIX.

Denies all the allegations contained in paragraph XIX of plaintiff's complaint, except as heretofore admitted. Defendant admits that interest in the sum of \$1,102.81 was paid on October 23, 1945.

XX.

Admits the allegations contained in paragraph XX of plaintiff's complaint, except denies that the taxes or interest, or any part thereof, were erroneously or illegally collected. [126]

XXI.

Denies all the allegations contained in paragraph XXI of plaintiff's complaint.

XXII.

Admits the allegations contained in paragraph XXII of plaintiff's complaint, except as denied in paragraph V of this answer.

XXIII.

Denies all the allegations contained in paragraph XXIII of plaintiff's complaint, except as hereto-

fore admitted. Defendant admits that interest in the sum of \$697.60 was paid on October 23, 1945.

XXIV.

Admits the allegations contained in paragraph XXIV of plaintiff's complaint, except denies that the taxes or interest, or any part thereof, were erroneously or illegally collected.

XXV.

Denies all the allegations contained in paragraph XXV of plaintiff's complaint.

Wherefore, having fully answered, defendant prays judgment and costs.

FRANK J. HENNESSY,

United States Attorney.

/s/ WILLIAM E. LICKING,

Asst. United States Attorney,

Attorneys for Defendant.

[Endorsed]: Filed July 26, 1948.

[127]

[Title of District Court and Cause.]

OPINION AND ORDER

Plaintiff is a non-profit, non-stock corporation, organized in the year 1907 under the laws of the State of California. This action is brought to recover income and excess profit taxes, plus interest to the date of payment, assessed for the years 1943 and 1944, and interest on the aggregate amounts from the dates of the alleged overpayments.

The tax returns and the consequent payment of

taxes for these years were made as the result of a demand by the Commissioner of Internal Revenue. The plaintiff had, prior to the years in question, been exempt from the payment of income and excess profit taxes.

The membership of the plaintiff corporation is largely made up of owners of pleasure cars. There is rendered to the members towing service, emergency road service, touring bureau service and service on the procuring of motor licenses. Plaintiff has rendered service to the public generally through road signing and [128] various war services in connection with the problems arising during the gas rationing period, acting as an official agency for the Federal Government in signing of highways in dim-out and black-out areas, and in rendering to members of the armed forces its services without cost. The taxpayer publishes a monthly magazine known as the "Motor Land". During the years in question it had no income from advertising. It was distributed to the entire membership and was not sold generally to the public. The emergency road service afforded the members is rendered under contracts which plaintiff makes with garages. This service is restricted to passenger cars. The garage bills are paid for by the members who receive the service but plaintiff makes no charge to the members for towing service. If a member is involved in an accident, plaintiff undertakes to adjust the matter of damages, and, if the member is involved in an arrest in a remote place, counsel is provided by the associa-

tion; if a fine is assessed the fine is paid by the plaintiff and the member is called upon to reimburse plaintiff for such outlay. The legal service which is rendered is furnished pursuant to an agreement made by the plaintiff and the State Bar of California. Plaintiff gives to its members a special limited traffic accident policy written by the North American Accident Insurance Company. The California State Automobile Inter-Insurance Bureau affords insurance service to certain of plaintiff's members. The bureau is a separate corporate entity. It is a reciprocal insurance exchange for the inter-exchange of insurance on a cooperative basis. No one can be so insured unless he is a member of the plaintiff association. The insurance is restricted to certain individuals who meet certain qualifications. There is no requirement that a member of the [129] plaintiff association become a subscriber to the bureau. The bureau writes participating insurance. The plaintiff and the bureau occupy the same office quarters in San Francisco and in each of thirty-five district offices. The bureau compensates the plaintiff for the space it occupies, the rental being calculated on a square foot basis. Other expenses, including personnel costs, are divided upon the basis of proper percentage of costs that should be borne by each organization and no profit was derived by plaintiff through its relationship with the bureau. Dues for the years in question were \$12 per year, plus an initiation fee for \$3 for the first year. Membership is open to all owners of automobiles who are not considered

too old and who are deemed to be persons without a bad traffic record or otherwise irresponsible. No social, racial or religious discrimination is made with reference to membership. It has been the policy of plaintiff to expend its annual income for services but during the years 1943 and 1944 for reasons readily apparent its services were restricted and curtailed. No dividends have been declared by plaintiff to its members and its income has never been paid or credited on its books to any of its members. The directors of the association serve without financial remuneration. The members have the right to participate in the affairs of the plaintiff, including their presence at the annual board meetings, notices of which are sent out at least 60 days prior to the meeting. Although plaintiff has no member clubs it is affiliated with the American Automobile Association and under that affiliation plaintiff recognizes the membership of such other clubs affiliated with that association when such members are visiting plaintiff's territory and such [130] visitors are entitled to many of the services above enumerated. Outside of the annual meeting, the meetings of the Board of Directors and other meetings occasionally called by plaintiff and its committees (which the members are entitled to attend), plaintiff does not have any social features. There are other activities such as safety education work, the distribution of safety posters and the sponsoring of school safety patrols, the making of traffic surveys and participation in activities relating to vehicle legislation, in which the plaintiff en-

gages. Plaintiff's records show that on December 31, 1937, there was a slight excess of receipts over expenditures but that during each of the years 1938, 1939 and 1940 there was a deficiency; that during the next 5 years the income exceeded the expenses and this resulted in surplus balances for each of these years. In 1946 the expenditures exceeded the income. A check of 16 years shows a surplus for 8 years and a deficiency for 8 years.

This abridged recital of the purposes and activities of plaintiff corporation is sufficient as a basis for approaching the problem which is to be solved, whether plaintiff comes within the exemption which excludes from the tax organizations falling within Section 101 (9) of the Internal Revenue Code, which reads as follows:

“Clubs organized and operated exclusively for pleasure, recreation and other non-profitable purposes, no part of the net earnings of which inures to the benefit of any private shareholder.”

This section poses three questions. 1. Is the plaintiff a club? 2. Is plaintiff organized and operated exclusively for pleasure, recreation and other non-profitable purposes? 3. Do any of its net earnings inure to the benefit of any of its members?

The New International Encyclopedia defines “club” [131] as “A word said to be derived from the Saxon cleafan to divide—a club being an association the expenses of which are shared among its members.” It “indicates a division of the reckoning”, *Merion Cricket Club v. United States*, 119

F. 2d 578, "a definite association organized for indefinite existence; not an ephemeral meeting for a particular occasion to be lost in a crowd at its dissolution", *Eichbaum v. Irons*, 6 Watts & S. 67. Plaintiff is an association the expenses of which are shared among its members. Equivalence between the proportion of a member's contributions and the benefits which he enjoys is of no moment as long as there is payment by him for the repeated use of its facilities, available to the members. The services provided by plaintiff to its members are for their pleasure and recreation, to enjoy to the extent the wants or fancies of the individual member requires.

Defendant contends that in order to constitute a club the purposes and activities must embrace a commingling of the members, one with the other, in fellowship; that it is not sufficient that the members make a common cause in a financial or other sense or that there be present group activity, both of which conditions are here found. *United States v. Anderson*, 108 F. 2d 475 and *Arner v. Rogan*, 27 A.F.T.R. 1093, cases in which the application of the excise tax under Section 501 of the Revenue Act of 1926 on "any amount paid * * * as dues or membership fees to any social, athletic or sporting club or organization" are advanced by defendant in support of its position. This section imposes an excise tax upon membership fees or dues while section 101 (9) exempts from income tax associations coming within the description. In considering the two statutes there is wanting identity in

objectives. There is differentiation [132] also in the terms used. A "social club" has a meaning different from a club "organized and operated exclusively for pleasure or recreation purposes." Webster defines the adjective "social" as "That is spent, taken, enjoyed, etc., in the company of one's friends or equals; as agreeable social relations." To be classed as a social club under the taxing statute the predominant purpose of the taxpayer must be social, (*Tidwell v. Anderson*, 4 F. Supp. 789). If it has some social activities this alone does not make it a social club and it is not such if the social features are merely incidental to main purposes which are of a nature other than social, *Bankers' Club of America v. U. S.* 37 F. 2d 982, or at least the social features must be a material part, *Merchants Club v. U. S.* 66 F. Supp. 126. The generic term "club" is used in both statutes; this alone is common to the two. The adjective "social" qualifies the noun "club" and limits it to such organizations as are "social" as above defined. It appears clear that a club operated for pleasure or recreation is one in which the members may carry out or enjoy those purposes acting either individually or collectively. It would require a strained and unwarranted construction to read into the description the qualification of "social". Had Congress so intended, such intention could readily have been expressed by supplying the adjective "social" as it did in section 501.

Is plaintiff organized and operated exclusively for pleasure, recreation and other non-profitable purposes?

The Collector says that if there exists a single purpose which is neither, pleasure, recreation or non-profitable, plaintiff may not be said to come within the exemption, and that this follows regardless of the number [133] and importance of the purposes falling within the designated purposes. *Better Business Bureau v. United States*, 326 U. S. 279, cited in support, would apply, (as that case limits itself), only if the other purposes are "substantial in nature". This theme is in Treasury Regulation 111 which deals with Section 101 (9), "Generally, an incidental sale of property will not deprive the club of the exemption". If the income is applied in carrying out the non-profitable purpose the exemption applies and this results without regard to the source of the income. *Scofield v. Corpus Christi Golf & Country Club*, 127 F. 2d 452. This is the line in the cases cited which bear upon the subject. But, it is replied, towing automobiles to garages, making emergency repairs, adjusting claims, pleading in traffic violation cases and payment of fines, supplying accident policies, renewing licenses and attending to the details of transfer of title to automobiles, services afforded through contracts with garages, lawyers, and insurance companies, do not come within the restricted meaning of "pleasure" and "recreation". The sum of the picture must be appraised. All of this was designed primarily to alleviate the hardships and inconveniences which sometimes arise in pleasure driving. It is reasonable to conclude that these services are within the listed purposes. Dur-

ing the years in question gasoline rationing was in effect. The basic "A" Book entitled a holder to gasoline which permitted him to drive his automobile about ninety miles per month. This, it is assumed, was used in obtaining the necessities of life for himself and family. Supplemental ration was required to be used for essential occupational purposes. Defendant Collector concludes that it is questionable whether any material part of plaintiff's activity during these years had to do with the pleasure or recreation [134] of its members. Plaintiff replies that the income, other than from membership dues and fees and reimbursements of charges advanced for the account of members, are insignificant in amount and not "substantial"; that the excess of income over expenditures were not profits and that no activities were conducted with third parties with the purpose of creating profits. I agree with plaintiff. The largest item of expenditure appears to be for the maintenance and operation of thirty-four branch offices maintained by plaintiff for the purpose of affording the members the services outlined. Included therein is reimbursement by the Bureau, computed on a cost basis. The next largest item of expenditure covers the emergency road service. No element of profit enters into that service. The other items of expenditures relate to services rendered the members and do not embrace financial profit. The argument is not persuasive that because the income exceeded the expenditures in each of these two years the purposes are not non-profitable. It is explained in

the evidence that this net income resulted from a curtailment of services during war conditions due to restrictions in pleasure driving. It has never been the intent of the plaintiff to build up a surplus, or to gain a profit, for itself or its members. The record discloses that the excess of membership dues and fees over expenditures in these years is offset by the cost of services to members in other years. The purpose of profit is not discoverable in the facts. The distinction is in the purpose. Or as the Supreme Court stated in *Trinidad v. Sagrada*, 263 U. S. 578, dealing with a similar exemption, "says nothing about the source of the income, but makes the destination the ultimate test of exemption". [135]

Though the services may have been rendered to many members who availed themselves thereof in their businesses rather than for pleasure or recreation this would not require the conclusion that the purposes are not within the exemption. The main objective is not financial gain to members but the rendering to them services which lend to their convenience in non-business activities. Membership in most organizations which are characteristically non-profitable has some element of commercialism. Since plaintiff's objectives translated into its activities are essentially non-profitable in a commercial sense, either to itself or to its members, it would appear that plaintiff is engaged in a non-profitable undertaking.

There is here not present the conducting of a "substantial and profitable business * * * which

had only an indirect relation to the original purpose for which it was created", as was apparent in *Aviation Club of Utah v. Commissioner*, 7 T.C. 366, affirmed in *Circuit Court of Appeals*, par. 72,-503 P.H. Federal Tax Service 1947, where the profits were derived from outside sources, "wholly disproportionate to its non-taxable purposes". The same differentiation must be kept in mind when considering such cases as *West Side Tennis Club v. Commissioner of Internal Revenue*, 111 F. 2d 6, where more than one-half of the club's income came from sales to the public of tickets to its tennis matches, or *Jockey Club v. Helvoring*, 76 F. 2d 598, where the income from transactions with outsiders was more than their cost to the club.

Finally, answer must be given to the claim that during these years 1943 and 1944 there accrued net earnings which inured to the benefit of the members. The members of the plaintiff corporations would be entitled to [136] a pro-rate distribution of its assets upon dissolution and a member is to be considered a "private shareholder". *West Side Tennis Club* 39 B.T.A. 149. As above noted it has never been the intention to distribute any net income direct to the members. There, of course, exists an indirect benefit through the disbursement in subsequent years of the surplus which is accumulated in any one year, thus increasing the services in such later years. But the purposes are not thereby changed. Had the savings resulted in reducing the dues, or liability therefor, this would not mean that they inure to the benefit of the mem-

bers within the ambit of the statute, if the earnings are used to further the purposes which are made the basis for the exemption. *Koon Kreek Klub v. Thomas*, 108 F. 2d 616. The Supreme Court in *Trinidad v. Sagrada*, 263 U. S. 578, construed an exemption of similar import and stated that the activities of the taxpayer could not be carried on without money and that making its properties productive to the end that the income is used for its purposes does not alter or enlarge those purposes. It is not the source but the destination of the income that governs. *Scofield v. Corpus Christi Golf & Country Club*, *supra*. At least this is so, unless the profits are wholly disproportionate to its non-taxable purposes, *Aviation Club of Utah v. Commissioner of Internal Revenue*, 162 F. 2d 984, or derived from the public, *West Side Tennis Club v. Commissioner of Internal Revenue*, 111 F. 2d 6.

It is my conclusion that plaintiff meets the conditions which entitled it to exemption. Findings will be prepared and submitted pursuant to the local rule.

Dated February 26th, 1947.

DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Feb. 26, 1948.

Entered in Civil Docket 2/27/48.

[137]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 26th day of February, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Dal M. Lemmon, District Judge.

[Title of Cause.]

ORDER FOR JUDGMENT IN FAVOR OF
THE PLAINTIFF AND AGAINST THE
DEFENDANT

This case having been heretofore tried and submitted, being now fully considered, it is, in accordance with an opinion this day signed and filed, Ordered that judgment be entered herein in favor of the plaintiff and against the defendant in accordance with the prayer of the complaint, upon findings of fact and conclusions of law and judgment to be prepared by the attorneys for the plaintiff and submitted to the court pursuant to the local rule. [138]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 25th day of June, 1947 before the Court, sitting without a jury; Plaintiff appearing by its attorneys, Arthur H. Deibert and George E. Sandford, and the Defendant appearing by William E. Licking, Assistant United States Attorney for the Northern District of California; and evidence both oral and documentary having been received and the Court having fully considered the same, hereby makes the following special Findings of Fact.

FINDINGS OF FACT

I.

That Plaintiff is and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of California, duly qualified to [139] transact business therein and having its principal place of business and office at 150 Van Ness Avenue, San Francisco 2, California, and within the First Internal Revenue Collection District of said State of California.

II.

That Defendant, James G. Smyth, a resident of said Northern District of California, is now and was at all times since the 14th day of May, 1945, the duly appointed, qualified and acting Collector of Internal Revenue for the First Internal Reve-

nue Collection District of California, and was the person to whom the sums herein sought to be recovered were paid by the Plaintiff.

III.

That Plaintiff at all times since the inception of Federal income taxation in 1913 had been exempt from the imposition of any Federal income and/or excess profits tax until it was finally advised by the Commissioner of Internal Revenue in a letter dated July 27, 1945, that further exemption was denied.

IV.

That because of said ruling of July 27, 1945 by the Commissioner of Internal Revenue the Plaintiff paid, under protest, income and excess profits taxes and interest thereon in the amounts and on the dates as follows:

1943—Income Tax and Interest.....	\$ 30,118.49
September 15, 1945	
1943—Excess Profits Tax & Interest..	140,795.41
September 15, 1945	
1944—Income Tax and Interest.....	37,947.20
September 15, 1945	
1944—Excess Profits Tax & Interest...	24,004.02
September 15, 1945	

Total.....	\$232,865.12
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V.

That the Plaintiff on or about October 23, 1945, and within two years of the payment of the amounts listed in paragraph IV above, filed claims for refund of said amounts respectively. Said claims set forth under oath the grounds for refund

relied upon by the Plaintiff and set forth sufficient facts to apprise the Defendant and the Commissioner of Internal Revenue of the exact basis of the said claims. The Commissioner of Internal Revenue rendered no decision on said claims within six months after the filing thereof, and the Plaintiff thereupon filed this action on May 29, 1946.

VI.

That the Plaintiff was organized in 1907 under the laws of the State of California as a non-profit corporation without capital stock. Each member possessed only one vote on the matters requiring action or sanction of the membership.

VII.

That the purposes of the Plaintiff have been practically unchanged since its organization and at all times pertinent herein were substantially as follows: to promote and encourage highway construction, improvement, betterment, maintenance and marking for the guidance and warning of the users; to urge adoption of just and intelligent legislation on the use of highways and the regulation of traffic thereon; to maintain offices for collecting and disseminating information and the furnishing of advice and assistance to the owners of automobiles; to protect the legitimate interests of its members in connection with its purposes; to affiliate and associate with similar organizations. None of the foregoing or any other purposes of Plaintiff were designed or intended to make a profit. [141]

VIII.

That the Plaintiff has only the powers necessary to carry out its purposes. The Plaintiff has no power to distribute or set aside any portion of its net income to its members or to any other person except to carry out its purposes.

IX.

That in furtherance of the purposes for which it was originally organized as an automobile club, Plaintiff has provided during the years 1943 and 1944 as well as prior and subsequent to said years, (1) a Touring Bureau which provides the members with complete touring data and assists them in planning motor trips; (2) an Emergency Road Service Department, which makes arrangements for the rendering of emergency road service to members who encounter automobile trouble on the highways, which service is restricted to passenger cars; (3) a Road Sign Department, which operates in conjunction with state and local authorities a service consisting of the erection and maintenance of direction and warning signs and historical markers; (4) a Public Safety Department, which carries on an active and aggressive campaign to reduce traffic accidents, eliminate traffic hazards and generally improve traffic conditions; (5) an Adjustment and Traffic Department, which advises and assists the members with respect to traffic violations and accidents; (6) a License Department, which assists members in the annual renewal of automobile registration with the State Department of Motor Vehicles and obtaining automobile license

plates, as well as Federal auto tax stamps; and (7) a Magazine Department which publishes and distributes free to the members a magazine, keeping them informed of motoring conditions and improvements, and [142] specializing in travel information with respect to trips to points of interest where members will find pleasure and recreation, and which has contained no paid advertising material since January 1, 1942. There is no sale or public distribution of said magazine.

X.

That the sum total of the activities of the Plaintiff is designed to alleviate the occasional hardships and inconveniences which are connected with the ownership and operation of pleasure automobiles, and the services rendered by Plaintiff are for the pleasure and recreation of its members.

XI.

That in addition to the normal activities and services of the Plaintiff during the two years here in question, Plaintiff engaged in many activities incidental to the war effort and performed many services for the general public, such as road signing as an official agency of the Federal Government in blackout and dimout areas, services in connection with gas rationing, information and advice furnished members of the armed forces, training of drivers for the Red Cross and other volunteer war services, and in arrangements of reservations and accommodations for its members.

XII.

That none of the normal activities or the war-time activities of the Plaintiff were conducted for

the purpose of earning a profit or accumulating a surplus, nor was any profit derived from any of these activities.

XIII.

It has been the policy of the Plaintiff to expend on services all its annual receipts, and during 1943 and 1944 [143] it was prevented from so doing only by reason of wartime restrictions. That in the 16-year period from and including 1931 to 1946 the Plaintiff has had a deficit in 8 years and a surplus in 8 other years.

XIV.

That the Plaintiff has never distributed, set aside, or credited on its books by way of dividends or from its earnings any money to any of its members as an incident of their membership in the Plaintiff association. That there has never been any intention to distribute any net income direct to the members. That the directors of Plaintiff serve without financial remuneration.

XV.

That the members of the Plaintiff association collectively defray all its expenses by the payment of identical membership fees and dues.

XVI.

That the Plaintiff is a continuing organization whose members make common cause both in a financial sense and in carrying out its stated purposes by group activity as well as by individual action.

XVII.

That Plaintiff has annual meetings of its members, meetings of its board of directors, and other meetings occasionally called by the Plaintiff and its standing committees, which meetings members are entitled to attend. Other than these meetings the Plaintiff has no social features. Membership is open to all owners of automobiles unless they are considered too old, have a bad traffic record, or are otherwise irresponsible. No social, racial or religious discrimination is made with respect to membership. [144] No memberships in Plaintiff are held by any other associations, clubs or organizations. No memberships in Plaintiff association are held by operators of trucks or commercial motor vehicles as such.

XVIII.

That Plaintiff association is now and at all times pertinent hereto was certified as a "Motor Club" by the State of California.

XIX.

That Plaintiff association is a club.

XX.

That Plaintiff association is a separate and distinct organization from the California State Automobile Association Inter-Insurance Bureau. Although Plaintiff and said Bureau jointly occupy the office quarters of Plaintiff association, said Bureau compensates Plaintiff for the space the former occupies, on a square foot basis, and Plaintiff derives no profit or earnings from its relationship with said Bureau.

From these facts the Court concludes:

CONCLUSIONS OF LAW

I.

A club is an association the expenses of which are shared among its members. Equivalence between the proportion of a member's contributions and the benefits which he enjoys is of no moment as long as there is payment by him for the repeated use of its facilities available to the members. Plaintiff is such an association.

II.

To constitute a club within the meaning of Section 101 (9) of the Internal Revenue Code it is not necessary that [145] its activities include social features or a commingling of the members, one with another, in fellowship, but it is sufficient if its members make a common cause in a financial or other sense, or if there is present group activity. Plaintiff meets these requirements.

III.

Plaintiff association is and was at all times here pertinent a club within the meaning of Section 101 (9) of the Internal Revenue Code.

IV.

A club operated for pleasure or recreation is one in which the members carry out or enjoy those common purposes acting either individually or collectively. Plaintiff association is such a club.

V.

Specific activities and services of Plaintiff which if performed by others might be deemed of a com-

mercial or profitable nature are, as carried on by Plaintiff, performed for purposes of pleasure and recreation of its members and not for profit.

VI.

The mere receipt of money, by an organization exempt under Section 101 (9) of the Internal Revenue Code, as a result of incidental activities, or in insignificant amounts, is not sufficient to destroy the exemption under that Section so long as the money is expended for exempt purposes. It is the destination and not the source of the income which governs the right to exemption.

VII.

The Plaintiff association was not organized or operated for the purpose of making a profit or building up a surplus [146] for the benefit of itself or its members.

VIII.

Neither the pleasure and recreation nor the non-profitable nature of Plaintiff's objectives and purposes is destroyed by its members' occasional use of its facilities and services for their individual business purposes.

IX.

The excess of receipts over expenditures of Plaintiff association resulting from the unavoidable curtailment of Plaintiff's services during any year did not constitute "net earnings" within the meaning of Section 101 (9) of the Internal Revenue Code, and did not inure to the benefit of any member of Plaintiff.

X.

Non-profitable purposes within the meaning of Section 101 (9) of the Internal Revenue Code are not changed to profitable purposes by the mere fact that in some years the receipts of Plaintiff exceeded its expenditures.

XI.

Plaintiff association was organized and operated exclusively for pleasure, recreation and other non-profitable purposes during the years 1943 and 1944.

XII.

No part of the net earnings of Plaintiff association inured to the benefit of any of its members during the years 1943 and 1944.

XIII.

Plaintiff is entitled to judgment as prayed.

DAL M. LEMMON,
Judge.

Dated March 24th, 1948.

[Endorsed]: Lodged 3/12/48. Filed March 24,
1948. [147]

In the District Court of the United States In and
For the Northern District of California,
Southern Division

No. 26,017-L

CALIFORNIA STATE AUTOMOBILE ASSO-
CIATION, a corporation,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Reve-
nue, of the First Internal Revenue Collection
District of California,

Defendant.

JUDGMENT

This cause came on regularly to be heard before the Court, sitting without a jury, on the 25th day of June, 1947. Plaintiff was present in Court and represented by its counsel, Arthur H. Deibert and George E. Sandford, and the Defendant was present in Court and represented by his counsel, William E. Licking, Assistant United States Attorney for the Northern District of California. Thereupon oral and documentary evidence was submitted by and on behalf of the parties to the action and at the conclusion of all the evidence both of the parties rested and the cause was submitted to the Court for its consideration and decision, and thereafter the Court, having fully considered the same and being fully advised in the premises, made and ordered entered and filed its Findings of Fact and

Conclusions of Law, which are here referred to.

Wherefore, by reason of the law and the evidence and the Findings of Fact and Conclusions of Law of the Court and the premises aforesaid, It Is Ordered and Adjudged and this does order and adjudge that the Plaintiff have judgment exempting it from the payment of income tax and excess profits tax for years 1943 and 1944, and that Plaintiff have and recover of and from the Defendant named above the total amount of \$232,865.12, plus interest thereon from September 15, 1945, until paid, together with the costs of Plaintiff necessarily incurred herein and hereby taxed in the sum of \$27.00.

Done and dated at San Francisco, California, this 24th day of March, 1948.

DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed March 24, 1948.

Entered in Civil Docket 3/25/48. Vol. V—Page 380. [149]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the Defendant James G. Smythe, Collector of Internal Revenue, hereby appeals to the United States Circuit Court

of Appeals for the Ninth Circuit from the final judgment made and entered herein on March 25, 1948 in favor of the above Plaintiff.

Dated May 20, 1948.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ WILLIAM E. LICKING,
Asst. United States Attorney.
Attorneys for Defendant,
James G. Smythe.

[Endorsed]: Filed May 20, 1948.

[150]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor,

It Is Hereby Ordered that the Defendant herein may have to and including August 18, 1948 within which to file the record and docket the cause in the appeal of the above case.

Dated June 29th, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed June 29, 1948.

[151]

Undocketed

In the United States Circuit Court of Appeals
for the Ninth Circuit

Civil No. 26017-S

JAMES G. SMYTH, Collector of Internal Revenue
of the First Internal Revenue Collection
District of California, Appellant,

vs.

CALIFORNIA STATE AUTOMOBILE ASSO-
CIATION, a Corporation, Appellee.

ORDER OF COURT

The affidavit of William E. Licking, Assistant
United States Attorney, requesting an extension
of time within which to file and docket the record
in the appeal of the above case, having been read
and filed, and good cause appearing to the Court
therefor;

It is hereby ordered that the time within which
Appellant shall file and docket the record in the
appeal of the above case shall be extended to and
including September 18, 1948.

CLIFTON MATHEWS,

Judge of the Circuit Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed Aug. 17, 1948. Paul P.
O'Brien, Clerk.

A True Copy, Attest: Aug. 17, 1948.

(Seal) PAUL P. O'BRIEN,
Clerk,

By FRANK H. SCHMIDT,
Deputy Clerk.

[Endorsed]: Filed Aug. 18, 1948. C. W. Cal-
breath Clerk. [152]

[Title of U. S. Court of Appeals and Cause.]

ORDER OF COURT

The affidavit of William E. Licking, Assistant United States Attorney, requesting extension of time within which to file and docket the record in the appeal of the above case having been read and filed, and good cause appearing to the Court therefor;

It is hereby ordered that the time within which Appellant shall file and docket the record in the appeal of the above case shall be extended to and including October 7, 1948.

CLIFTON MATHEWS,
Judge of the Circuit Court for the Ninth Circuit.

[Endorsed]: Filed Sept. 23, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Sept. 24, 1948. C. W. Calbreath, Clerk. [153]

In the Southern Division of the United States
District Court for the Northern
District of California

[Title of Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the above entitled Court and to
Messrs. George E. Sandford and A. H. Diebert,
attorneys for plaintiff:

Defendant above by its attorneys hereby designates for inclusion in the transcript of record upon appeal the following:

1. The complaint and attached exhibits;
2. The Answer;
3. All of plaintiff's exhibits in evidence;
4. All of defendant's exhibits in evidence;
5. The Reporter's Transcript;
6. The Opinion and Order of the District Court; [154]
7. The Findings of Fact and Conclusions of Law;
8. The Judgment of the Court;
9. The Notice of Appeal;
10. The Order of the District Court of June 29th extending time to file and docket Record on Appeal;
11. The Order of Circuit Court extending time to file and docket Record on Appeal;
12. The Order of the Circuit Court on September 25th extending time to file and docket Record on Appeal;

13. Statement of Points Intended to be relied upon on appeal;

14. Designation of Record.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ WILLIAM E. LICKING,
Assistant United States
Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 24, 1948. [155]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE
DEFENDANT INTENDS TO RELY
ON APPEAL

Defendant hereby designates the points on which defendant intends to rely on the appeal of said cause to the United States Court of Appeals for the Ninth Circuit, this designation to be filed with the transcript of record.

1. The District Court erred in holding that the plaintiff received no income during the years 1943 and 1944 that was subject to the federal income tax.

2. The District Court erred in holding that plaintiff was, during the years 1943 and 1944, a club organized and operated exclusively for pleasure, recreation and other nonprofitable purposes within the meaning and intent of the provisions of Section 101 (9) of the Internal Revenue Code. [156]

3. The District Court erred in holding that no

part of the plaintiff's net earnings during the years 1943 and 1944 inured to any of its members within the meaning of Section 101 (9) of the Internal Revenue Code.

4. The District Court in holding that plaintiff was exempt from the payment of federal income taxes during the taxable years of 1943 and 1944 by the provisions of Section 101 (9) of the Internal Revenue Code.

5. The District Court erred in failing to give judgment for the defendant.

6. The District Court erred in holding that plaintiff is entitled to judgment in the sum stated or any judgment.

7. The District Court erred in holding that plaintiff is entitled to judgment for its costs of suit.

/s/ FRANK J. HENNESSY,

United States Attorney,

WILLIAM E. LICKING,

Assistant United States

Attorney,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 24, 1948. [157]

District Court of the United States,
Northern District of California

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 157 pages, numbered from 1 to 157, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of California State Automobile Association, a Corporation, Plaintiff, vs. James G. Smyth, Collector of Internal Revenue of the First Internal Revenue Collection District of California, Defendant, No. 26017-L, as the same now remain on file and of record in my office.

I further certify that the cost of preparing the foregoing transcript of record on appeal is the sum of \$62.80 and that the said amount has been charged against the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 30th day of September, A.D. 1948.

(Seal)

C. W. CALBREATH,
Clerk. [158]

In the Southern Division of the United States
District Court, in and for the Northern
District of California

Before: Hon. Dal M. Lemmon, Judge.

No. 26,017-S

CALIFORNIA STATE AUTOMOBILE ASSO-
CIATION, a corporation,

Plaintiff,

vs.

JAMES G. SMYTH, Collector of Internal Reve-
nue of the First Internal Revenue Collection
District of California,

Defendant.

REPORTER'S TRANSCRIPT

Appearances: For the Plaintiff: George E. Sand-
ford, Esq., and A. H. Deibert, Esq. For the De-
fendant: William E. Licking, Esq., Assistant
United States Attorney.[1*]

Wednesday, June 25, 1947

10:00 o'clock a.m.

The Clerk: California State Automobile Asso-
ciation vs. Smyth.

Mr. Deibert: This is an income tax case involv-
ing the California State Automobile Association,
and for the years 1943 and 1944, the corporation
being on a calendar year basis.

The point in question is whether or not the Cali-

* Page numbering appearing at foot of page of original
certified Reporter's Transcript.

ifornia State Automobile Association is entitled to exemption from income taxes, and secondly, from excess profits taxes—

The Court: Well, getting down to the pleadings, I observe that in Paragraph 1—Paragraph 5 of the complaint alleges that taxes were paid on October 14, 1945—I mean September 14, 1945, and the answer denies that and alleges it was paid October 14, 1945. I don't know how material that is.

Mr. Licking: The fact is, your Honor, the taxes were not paid on either the 14th of September or in October, as we have averred; they were originally paid on the 15th day of September, 1945, and that is the fact.

Mr. Deibert: Yes, we have a stipulation, your Honor, covering that point, making the payment date September 15, 1945.

As a matter of fact, the taxes were paid with two checks, one of which was dated September 14, and the other not until [2] September 15.

The Court: The real factual issue, then, is the character of the plaintiff corporation.

Mr. Deibert: That is correct.

Mr. Licking: That is all.

The Court: Can you enter into any stipulations to narrow this issue?

Mr. Licking: Well, we have stipulated that certain documents be put in evidence. The stipulation is here any time they offer the documents. They are really in the nature of joint exhibits, so far as that is concerned.

Mr. Deibert: Yes.

Mr. Licking: Insofar as the Government is concerned, those statements show the nature of the organization, show what it was organized for, and they contain the affidavit of an officer of the Association as to the type of business in which the Association was engaged at the time. I understand the factual situation is somewhat different at this time.

Mr. Deibert: Yes, the factual situation has somewhat changed since that period. The information Mr. Licking refers to is an affidavit of Mr. D. E. Watkins, General Manager and Secretary of the Association, which was dated October 5, 1941, so that obviously it does not cover the period of the two years in suit here. We have stipulated nearly all of the documentary evidence, and I shall introduce that [3] stipulation later, but we feel it is necessary in order to present a complete picture of the history, the activities of the Association, and particularly during 1943 and 1944, to present certain oral evidence, which we shall do as rapidly as possible, and we wish to go forward with the case and conclude it just as soon as we can, today if possible. That may depend upon the amount of cross-examination, but we want to go along just as speedily as we can.

Now, for the years 1943 and 1944, and only because they were demanded to by the Commissioner of Internal Revenue, the corporation did in 1945 file income tax and excess profits tax returns for those two years and paid on account of taxes and interest up to the date of payment for the two

years—that is, including income and excess profits taxes for each of the two years, an aggregate of \$232,865.12.

We expect to show that this association was organized in 1907 as a non-profit, non-stock corporation, under the laws of the State of California, and that until a ruling was received late in September, 1944, by the Association from the Commissioner of Internal Revenue at Washington, throughout its history the Association had been considered and had been granted exemption from the payment of any income taxes.

This exemption is based on statutes which first came into the revenue laws with the Revenue Act of 1916 and has continued down to the present time almost unchanged. It is now [4] in the Internal Revenue Code and has been in that code since 1938 in Section 101(9), and which provides exemption from income taxes to certain corporations in the following language:

“Clubs organized and operated exclusively for pleasure, recreation, and other non-profitable purposes, no part of the net earnings of which inure to the benefit of any private shareholder.”

That is the whole section for your Honor's consideration, so that the issue is a very narrow one.

Throughout the history of revenue legislation, beginning with the Act of 1916, this specific exemption was contained in the Act and has been continued with a very minor exception ever since. That minor exception is this: that originally the word-

ing was "private stockholder or member," and that was later changed to private shareholder. That is an immaterial change, of course.

The plaintiff in this case, we contend and we believe we can show, has always throughout its history been operated exclusively for the pleasure and recreation of its members and for other non-profitable purposes, and none of its net earnings has ever inured to the benefit of any member, nor has there ever been any intention that they should inure to the benefit of any member.

Plaintiff association is one of the best known and one [5] of the largest automobile clubs in the United States, and it has been operated ever since 1935 under the laws of the State of California and under a Certificate of Authority issued by the Insurance Commissioner of California as a motor club, and we have included in the stipulated documents certificates issued by the Insurance Commissioner to the Association as a motor club ever since the law came into effect in 1935.

We expect to show that the Association carries on a number of activities:

That it prepares and distributes free of charge to its membership a vast number of maps and other publications and services; that it has never been engaged in any profit-making operations; that it has never financed or helped to finance its members in the purchase of automobiles; it has never given to its members the right or privilege under any circumstances of purchasing automobile accessories or other supplies at a discount; it has never sold automobile supplies or accessories at a dis-

count to its members as they do in some other automobile clubs of this country.

The stipulation to which Mr. Licking has just referred contains in documentary form the history of the present controversy which arose first by a letter addressed to the plaintiff by the Collector of Internal Revenue at San Francisco on September 10, 1941, requesting a sworn statement by one of its principal officers respecting its activities, [6] the source and disposition of its income, and any other activities which might affect its tax-exempt status, which, as I said before, had been afforded it without question up to that time ever since the Income Tax Act came into existence in 1916.

In compliance with that request, Mr. D. E. Watkins, the General Manager, on October 5, 1941, executed an affidavit, which, with the exhibits, is also in the stipulation, containing a statement regarding the activities of the Association at that time and up to that time.

That was forwarded to the Collector in response to his letter.

We think it is worthy of note that the Commissioner waited almost three years before again communicating with the plaintiff with reference to income evidence and exemption. The next communication from the Commissioner was a letter dated September 23, 1944, which for the first time denied the Association income tax exemption, and notification made that such denial was retroactive to January 1, 1943, which was almost two years prior to the date of that notification.

I was retained by the Association and went to Washington for conference with reference to this matter, as a result of which I wrote a letter to the Commissioner of Internal Revenue on June 14, 1945.

We are protesting not only the withdrawing of the [7] exemption, but also protesting what we consider to be the harsh effect of the ruling in late 1944 being made retroactive to January 1, 1943, when the Association had had no information from the Department for a period of nearly three years that such exemption would be denied.

The final letter of the Commissioner denying the exemption was dated July 27, 1945, and that letter also is within the stipulation.

We believe that the denial of the exemption to this plaintiff, in common with all other automobile clubs within the United States, was an error of law, and because of the peculiar facts concerning the operation of this Association, which will be outlined to your Honor in oral testimony, we believe that we do and always have come within the tax exempt provision of the law, which as I have already pointed out, is Section 101(9) of the Internal Revenue Code, and we believe the Commissioner made his ruling on the basis of a clear misinterpretation of certain cases which he cited in support of that ruling.

We feel very strongly that the Association is entitled to exemption for 1943 and 1944, as it had been throughout its prior history, and that there should be no tax under the circumstances. The

Association did pay the tax at the time it filed its returns and then filed claim for refund, and under the Internal Revenue Code a taxpayer has the right, [8] as your Honor knows, to file a suit for the recovery of taxes so paid if the Commissioner within six months of filing of the claim has not acted on the claim. He did not so act, so we filed this suit prior to his reduction of the claim, but that followed later.

The Court: The claim for the refund was filed when?

Mr. Deibert: Pardon me?

The Court: When was the claim for refund filed?

Mr. Deibert: Claims for refund were filed—

Mr. Licking: It was filed as alleged in the plaintiff's complaint.

Mr. Deibert: What was that?

Mr. Licking: I say it was filed as alleged in the plaintiff's complaint.

Mr. Deibert: That is alleged in the complaint, your Honor. We have—

Mr. Licking: Paragraph 3, Page 5—or Paragraph 12 on Page 5.

Mr. Deibert: Yes, on or about October 3, 1945.

The Court: You say no action was taken by the Commissioner on it and six months later this action was instituted?

Mr. Deibert: Yes, that is true, your Honor.

Mr. Licking: I will make a very brief statement. Counsel has stated the situation.

In connection with the failure of the Commis-

sioner to act [9] promptly after 1941, I take it, is explained by the fact that this action was a national action taken as to all similar clubs in 1943 and had not been taken as to any of them prior to that time. There is no difference between 1941 and 1943, as far as this club is concerned, or any other club in the United States. That followed G.C.M. 23,668, which was issued in 1943. In other words, it was a change at that time of the Department in reference to all clubs.

Mr. Deibert: My information is that the action as to different clubs was taken at different times, but I am familiar with the G.C.M. to which Mr. Licking refers, which was a general ruling by the General Counsel of the Bureau of Internal Revenue.

Mr. Licking: And which reverses prior decisions, and for the convenience of the Court, and I take it Counsel has no objection, I intend to offer it.

Mr. Deibert: None whatever.

Mr. Licking: I intend to offer it.

Mr. Deibert: As a matter of fact, it is a publication—

Mr. Licking: It is published. I merely want for the convenience of the Court to supply this copy.

Mr. Deibert: Yes.

Mr. Licking: Now, there isn't any conflict about the facts in the situation, and they all appear, as I have stated before, in documentary evidence which will be submitted to [10] the Court.

The Government's position is that this is not

an association for the pleasure or recreation of its members, or for any similar purpose; that it is flatly and frankly a service club which offers to its members services which are commercially available; that there is no restriction on the membership except the ownership of an automobile and the ability to pay the dues, and that the purpose of the club is not the pleasure and recreation of its members, or is not any similar purpose, but it is flatly and frankly a service club that offers certain services to its members which are available commercially, but it offers those services to those members at a lesser price than those services would be available commercially.

That is the whole issue in the matter, whether this is a club—first, whether it is a club or association within the meaning of the Act; second—

The Court: I do not apprehend that there is very much difference between you as to the activities and character of this club. It is a matter of construction or interpretation of whether it is a club within the meaning of this provision.

Mr. Licking: Whether it is a club within the meaning of that and whether its purposes are within the meaning. There are two questions. It seems probably somewhat technical to [11] argue whether it is a club or association—

The Court: I think most of us can almost take judicial notice of the activities of the club that are so well known. I thought that you could agree on what the activities are.

Mr. Licking: My own position is that all the activities of the club are reflected properly in the

documentary evidence which we have stipulated be introduced in the case, in the evidence that Mr. Deibert mentioned here as to these things the club does not do, I think that is entirely irrelevant to this particular case, what the club does not do. It is a matter of what the club does do. That is the only issue in the case, whether it is, within the meaning of 101 of the subsection quoted, a club or association conducted for the pleasure and recreation of the members or for other similar non-profitable purposes. That is the whole question.

Up to 1943 the Commissioner apparently considered that it was such an organization. He asked for certain information, which was given him in 1941 by the company as to its activities, and in 1943 the assessments here complained were based on that information furnished by the corporation.

The Court: That information that was given, are you going to amplify that?

Mr. Licking: As far as the Government is concerned, the Government's case is in these documents.

Now, I have told Mr. Deibert it seems to me that some of [12] the evidence he proposes to introduce might clarify the situation for the Court, but certainly this evidence as to what activities the Association did not engage in I intend, of course, to object to, and I think the Court will sustain those objections, as to what activities they did not engage in.

Now, as to the activities they do engage in, it seems to me the only material thing is whether

or not there was any change in the activities of the Association for the years for which the refund is requested.

The Court: Can you stipulate to that? Is there any dispute on that?

Mr. Licking: There are certain matters that Mr. Deibert felt in that matter—and on the relevancy of that evidence I agree with him—what change there was between the situation as set out in their own statement in 1941 and the subsequent years.

The Court: What changes were there?

Mr. Deibert: Well, there are very specific changes, your Honor, but aside from that, this affidavit submitted by Mr. Watkins in October, 1941, was very brief; it didn't go into many of the details that we feel should be brought out in a case of this kind because they have a very definite and fundamental bearing upon the character of the club itself, and we do not agree that we could possibly rest our case [13] alone on the affidavit of Mr. Watkins, which was only eight or nine pages and does not contain much of the history which we intend to bring out to show the original purpose of the Association, what it did in early years. We should be very happy to stipulate if we felt that we could properly present the case on such a stipulation, but we feel we absolutely cannot.

The Court: Well, proceed then. Call your first witness.

Mr. Deibert: I wish to first introduce in evidence this stipulation together with the accompany-

ing documents and ask that it be appropriately marked.

The Court: It will be received if there is no objection.

Mr. Licking: There is none, your Honor.

The Court: And the documents are what, briefly?

Mr. Deibert: The documents contain, briefly, the original articles of incorporation, the amended articles of incorporation—

Mr. Licking: May those—I don't believe they have any distinctive marks, as they are—the are merely given a number.

The Clerk: 1-A, 1-B?

Mr. Deibert: Very well. And the letters that passed back and forth between the Association and the Collector of Internal Revenue as outlined in my opening statement; copies of the income tax returns for 1943 and 1944; copies of [14] certificates issued each year by the Commissioner of Insurance of the State of California; and then the final paragraph is a stipulation as to the correct date upon which the taxes were paid, September 15, 1945.

Mr. Licking: For the record may we formally identify these different documents. 1-A will be the articles of incorporation of the California State Automobile Association.

Mr. Deibert: Yes.

The Court: I think the Clerk has already marked them.

The Clerk: The stipulation itself is 1; 1-A is the articles of incorporation.

Mr. Licking: 1-B would be the certified copy of the resolution amending the articles of incorporation.

The Clerk: 1-C would be the letter from the Treasury Department to the State Automobile Association dated September 10, 1941.

Mr. Licking: And 1-D is the affidavit of D. E. Watkins, the Secretary of the California State Automobile Association, regarding the activities of the Association.

The Clerk: 1-D, yes. And 1-E are the compilations—

Mr. Deibert: No, the compilations, a statement of income and expenses, were attached to that affidavit as exhibits.

Mr. Licking: They are a part of the affidavit. They should be clipped together with this.

Mr. Deibert: And this (indicating). [15]

Mr. Licking: All together with the financial statements for the previous years.

Mr. Deibert: That is right.

The Clerk: That is 1-D?

Mr. Licking: 1-D, the affidavit of Watkins with the attached documents.

The Clerk: And the letter from the Treasury Department—

Mr. Licking: 1-E, dated September 23, 1944, from the Office of the Commissioner to the State Automobile Association.

The Clerk: And 1-F will be the—

Mr. Licking: Copy of the letter from Mr. Deibert dated June 14, 1945, addressed to the Commissioner of Internal Revenue.

The Clerk: That is correct. 1-G—

Mr. Licking: 1-G would be a letter dated July 27—

The Clerk: Pardon me, there is a balance sheet here.

Mr. Licking: That belongs to that (indicating).

Mr. Deibert: That belongs to my letter.

Mr. Licking: That is part of 1-F.

The Clerk: 1-G will be the letter—

Mr. Licking: Letter from the Office of the Commissioner dated July 27, 1945.

The Clerk: That is correct.

Mr. Licking: 1-H is a copy of the Income and Declared Value Excess Profits Return of the Association for the year [16] 1943. And 1-I is a copy of the return for the year 1944.

1-J is four certificates from the Department of Insurance in the State of California authorizing the California State Automobile Association to sell or contract for rendering motor club service during the years 1942, 1943, 1944 and 1945.

Mr. Deibert: No, 1947.

Mr. Licking: Is there a gap?

Mr. Deibert: Yes; we didn't put the others in there, because we just wanted to show why this last one was still in existence.

Mr. Licking: Well, the same certificates are in effect.

Mr. Deibert: That is right.

Mr. Licking: There was no change.

Mr. Deibert: No change.

The Clerk: Just one exhibit, those four certificates?

Mr. Deibert: That is right.

(The documents above referred to were thereupon received in evidence and marked Plaintiff's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-I and 1-J, respectively.)

Mr. Licking: And then there is the stipulation which we mentioned to the Court as to the date of payment, that these taxes were actually paid on September 15, 1945.

Mr. Deibert: Now, your Honor, we have substituted for the originals—I hold the originals in my hands— [17] photostatic copies, if that is agreeable to your Honor, I think it is to Mr. Licking, to substitute photostatic copies instead of the originals.

Mr. Licking: I haven't any objection to that.

Mr. Deibert: I will furnish Mr. Licking with copies.

Mr. Licking: I have certified copies of the income tax returns here. I haven't any objection. You have, of course, the original.

The Court: Very well.

Mr. Deibert: My first witness is Irving H. Kahn.

Mr. Licking suggests the introduction of the claims for refund. We have no objection to that.

Mr. Licking: I think it will give the Court a clearer view of the situation.

Mr. Deibert: They are not denied in the answer, and we readily agree they go into evidence.

Mr. Licking: As stated, of course, this is—the suit is for recovery of income tax and excess profits

tax. I would like to offer in evidence the claims for refund for the income tax assessments for 1943; offer a certified copy.

(The document in question was thereupon received in evidence and marked Defendant's Exhibit A.)

Mr. Licking: And for excess profits tax for the same year 1943. They may be marked together.

The Court: Very well. [18]

Mr. Licking: As one exhibit. And the same claims for refund for the year 1944,—that is, for income tax and excess profits tax.

I believe that that gives the Court the entire picture, so far as the claims of the Government, the incident of the tax and the statement—I don't think there is anything out of the picture now; everything is there.

(The copies of Claims for Refund of Income Tax and Excess Profits Tax for the year 1944 were received in evidence and marked Defendant's Exhibit B.)

Mr. Deibert: Yes. Those are Exhibits A and B, are they?

The Clerk: Yes.

Mr. Deibert: Mr. Kahn.

Mr. Licking: The other exhibits, I take it, were joint exhibits?

Mr. Deibert: That is right.

IRVING H. KAHN,

called as a witness on behalf of the plaintiff; and being first duly sworn, testified as follows:

Direct Examination

Mr. Deibert: Q. Where do you reside, Mr. Kahn?

A. In San Francisco, at 3364 Washington Street.

Q. In what business are you now engaged?

A. I am an officer and director of several corporations, but [19] primarily engaged as business counsellor.

Q. What is your business address?

A. 300 Montgomery Street in San Francisco.

Q. Are you a member of the California State Automobile Association? A. I am.

Q. Have you ever held any office in that association?

A. I have been on the Board of Directors for something over twenty-five years and during that period served several terms as Treasurer, three terms as Third Vice-President, two terms as Second Vice-President, and in 1943 and 1944 served as President.

Mr. Licking: If you are attempting to qualify the witness as familiar with the affairs of the Association I am willing to stipulate he is.

Mr. Deibert: Yes, very well.

Q. Do you now hold any office in the Association?

A. I am a director of the Association and Chairman of the Executive Committee.

(Testimony of Irving H. Kahn.)

Q. What were your duties as President?

A. Besides the—

Mr. Licking: What is the purpose of this question, to qualify the witness?

Mr. Deibert: Well, to have him explain what he did during his term of office, which encompassed the period of two years [20] involved in this suit.

A. Besides the great majority of proceedings at meetings of the Board, I was in constant touch with the executive staff in the general working out of policies, consultations on matters of operation during the war years, most of which time I was involved in making radical changes from our normal operations to meet war time conditions, making recommendations to the Board of Directors, most of which recommendations were acted on favorably.

Q. And you have been a member of the Association for how long?

A. For 37 years. I joined in the spring of 1911. I am now in my 37th year.

Q. How long have you been an operator of a motor car?

A. I had my first car in the late summer of 1910.

Q. What was your reason for joining the Association?

Mr. Licking: That is objected to as immaterial.

The Court: Sustained.

Mr. Licking: —what his reason was for joining the Association.

The Court: Sustained.

Mr. Licking: That has nothing to do with the issue in this case.

(Testimony of Irving H. Kahn.)

The Court: Sustained.

Mr. Deibert: Pardon me?

The Court: Sustained. [21]

Mr. Deibert: It seems to me, your Honor, the reason for this witness joining the Association is material, because he will testify, I think, as to what conditions were at that time, what induced him to join the Association, what type of organization it was, and what benefits he expected.

The Court: I do not see what his reasons for joining would have to do with it, what bearing upon the issue here. I am only interested in the activities of the Association and its character. His reasons for joining are immaterial. Sustained.

Mr. Deibert: May I have an exception, your Honor?

The Court: You may.

Mr. Deibert: Q. Did you receive any salary or other compensation for services as President?

Mr. Licking: Same objection.

The Court: Same ruling, immaterial.

Mr. Deibert: Are you familiar with the various activities of the plaintiff during the years 1943 and 1944, as well as from 1911 when you joined, and since 1944? A. I am, sir.

Q. Did you participate in planning or establishing such activities in 1943 and 1944?

A. Yes, sir.

Q. What did you do in that connection?

Mr. Licking: It is immaterial, if the Court please what [22] was planned to be done. What is material is what was done.

(Testimony of Irving H. Kahn.)

The Court: I think so. Sustained.

Mr. Deibert: May I have an exception, your Honor?

The Court: Very well.

Mr. Deibert: Q. What were the activities of the plaintiff during 1943 and 1944?

Mr. Licking: Calls for a self-serving declaration, if the Court please.

The Court: Overruled.

The Witness: A. The Association continued in 1943 and 1944 rendering the general type of service which it had rendered for many years past to its members in order to facilitate the use of their pleasure cars and to make possible adequate use of them. The activities of the Association had been before, and were continued during that period, in the matter of legislation affecting highways, construction of highways, the laws and regulations which control speed limits and the enforcement of the law as it related to speed limits. It provided out of its own funds a substantial—

Mr. Licking: If the Court please, while the objection does not come properly, I admit, this is not responsive and is a self-serving declaration on the part of an officer of the corporation. He answered the question. He said the activities were the same as they had been before and were the activities for which the organization was formed. The [23] question is answered, and the rest of this is just—

Mr. Deibert: But he did not outline what those activities were, Mr. Licking.

Mr. Licking: They are outlined in your Exhibit

(Testimony of Irving H. Kahn.)

1. I take it you are not engaged in any extra-curricular activities; that is, the activities are confined to the activities set out in the articles of incorporation, and the purposes.

Mr. Deibert: That is true, of course. The Association did not go beyond the scope of the chartered powers; but those are very general and they are not outlined in detail in the charter.

Mr. Licking: If the Court please, I would like to call the Court's attention to Exhibit 1.

The Court: That is the one that is attached to the—the stipulation?

The Clerk: Articles of Incorporation.

Mr. Licking: Yes, Exhibit 1 is attached to the stipulation, Articles of Incorporation.

Paragraph 2 states plainly enough what the purposes for which the corporation was formed are, and I think the corporation did not engage in any other activities than those set out there.

Mr. Deibert: It does not state them in detail, your Honor, and we think the Court should be informed in detail as to what the corporation did.

The Court: Overruled.

The Witness: May I have the last few words of my answer so I can get the connection?

Mr. Licking: I would like the question read.

(Record read.)

The Witness: A. (Continuing): It provided out of its own funds a contribution toward the signing of highways, it furnished its members with maps and travel information as to all conditions;

(Testimony of Irving H. Kahn.)

it publicized to its members the many regulations which had developed as a result of the war and then devoted the greater part of its energies to cooperating with its members in the many problems of gas rationing, securing of parts in the way of repairs, to put all of its facilities at the disposal of the Federal Government and became an official agency of the Federal Government in the signing of highways in relation to dimouts and blackout areas; in preparing special maps for its members who had to make necessary trips during the war. It continued as far as possible to inspect roadside lodgings, to make reservations for its members and to keep them informed of road conditions.

Due to war conditions it restricted many of its operations by limiting their operations to those things—

Mr. Licking: I don't like, if the Court please, to interrupt; however, the last response of the witness there certainly is not answering any question and certainly is [25] argumentative. The question was, what activities he was engaged in.

The Court: That is what we are interested in, what activities were engaged in. The reasons for engaging in them are not material.

Mr. Licking: That is what I had in mind, your Honor.

The Court: If you will confine your answer to the activities.

The Witness: A. All right. While normally our activities were limited to serving our members,

(Testimony of Irving H. Kahn.)

we undertook to serve all members of the armed forces who came into our territory in the matter of providing highway information, reservation service, and other services, and furnished the same services without cost to any person representing that they were coming into our territory seeking or having secured Government employment.

Mr. Licking: That is a nice, patriotic gesture, if the Court please, but it seems to me hardly relevant.

The Court: Do you move to strike it out?

Mr. Licking: Yes.

The Court: Denied.

The Witness: A. We undertook without charge to train the volunteer drivers of the American Red Cross and the American Women's Volunteer Service. And beyond these things we voluntarily did, we actually had the Army come in and [26] commandeer one entire floor of our building, and we housed them without knowing whether we would or would not receive compensation.

Mr. Licking: If the Court please, it seems to me this is not a statement of activities at all. This is a sort of rambling narrative.

The Court: I think it has a bearing on the activities. Proceed.

The Witness: A. In the course of our normal activities we undertook to protect the interest of our members in the matter of when they are involved in accidents, of adjusting for them the damages with a third party. If they are unfortunate

(Testimony of Irving H. Kahn.)

enough to be involved in an arrest, we continued to appear in court to represent them.

Going back for just one moment to the matter of our activities during the war, and while it is not activities, if it is not out of order I would like to go back to say—

Mr. Licking: If the Court please, I understood that was the only question that the witness was supposed to be answering, that is, the activities of the Association during the period here concerned.

The Court: The witness' conclusion as to whether it was or was not an activity may or may not be correct—but you understood the question—

The Witness: A. I understood the question.

The Court: —to define the activities of the [27] Association?

The Witness: A. I was trying to indicate, your Honor, that the type of activities in many cases were restricted because of war conditions and that we diverted equipment and man power from the recreational signing of our highways to the signing of highways for military purposes.

Mr. Licking: It seems to me that is entirely non-responsive and self-serving, and should be stricken.

The Court: Well, the motion is denied. Proceed.

The Witness: A. We provided emergency road service for our members if they met with disaster on the highways or had mechanical trouble that they could be taken in off of the highway to the

(Testimony of Irving H. Kahn.)

nearest place of garaging and servicing; we maintained a register of automobile repair shops which we had investigated and where we were able to certify to our members that we believed that the charges there would be reasonable, and if the charges were not, we would undertake to adjust any complaints which arose.

We continued to investigate and recommend places of lodging. We undertook to secure reservations for our members and members of the armed forces who were traveling in the area, reservations at those places which were difficult to obtain.

We continued to provide a service for the renewal of membership licenses, and continued our general activities [28] that we had rendered over the years.

Mr. Deibert: Q. To whom were these services rendered?

A. Normally, sir, to the members of our Association, and members of affiliated clubs of the American Automobile Association. They were extended, as I stated previously, to members of the armed forces and the volunteer workers of the American Red Cross and volunteers of the AWVC, American Women's Volunteer Corps.

Q. What was the purpose of rendering these various services?

Mr. Licking: Objected to as immaterial what the purpose was.

The Court: Sustained.

Mr. Deibert: May I have an exception, your Honor?

(Testimony of Irving H. Kahn.)

Q. Were the activities of the Association and services to members normal in 1943 and 1944?

Mr. Licking: Objected to on the ground it has been asked and answered. He stated the services were not normal and explained how they were not normal.

The Court: Yes. Is there any further explanation you want to make as to the difference between the activities before and during that period? Have you fully explained it?

The Witness: A. I have explained the activities, yes, sir.

Mr. Deibert: Q. The change in activities?

A. Yes, sir. [29]

Mr. Deibert: That is all.

Cross Examination

Mr. Licking: Q. Your answer in brief to the questions propounded by Mr. Deibert is that during the period covered here, in 1943 and 1944, you continued so far as war conditions permitted, in the same activities you had engaged in before? That is your answer, isn't it?

A. The same activities in relation to services rendered our members.

Q. Yes. Now, when you described the activities of the Association with reference to the services rendered to your members, did you intend that to be comprehensive, or did you just mention certain services?

A. I mentioned the main services, but I did not attempt to enumerate all of them.

(Testimony of Irving H. Kahn.)

Q. You did not attempt to enumerate all of them? A. No.

Q. That is, there were other things during that period? You furnished some help or assistance in the matter of insurance during that period, did you not?

A. Not as part of the California Automobile Association.

Q. Not as part—well, how did you do it? You say not as part of the California State Automobile Association. How did you furnish that service?

A. Well, the California State Automobile Association did not [30] furnish any insurance services.

Q. You say not as part—I asked you if the Association furnished any insurance service to its members, and you said, not as such.

A. The answer should have been “No”, then, sir.

Q. It should have been “No”. What did you mean when you said “not as such”?

A. I assume, sir, you mean the Inter-Insurance Bureau which is composed of certain members of the California State Automobile Association.

Q. May I ask just one other thing in connection with that: Is it not a fact that that is composed solely of members of your Association?

A. It is composed solely of members—

Q. Solely of members of your Association?

A. Not all members.

Q. Any member of your Association that wishes

(Testimony of Irving H. Kahn.)

to avail themselves of the services of the Inter-Insurance Bureau may do so, and nobody that is not a member of your Association may do so, is that correct?

A. As to your first statement, I think there must be a qualification: If a member has a record of hazardous driving or bad insurance record, I am sure he cannot avail himself of that service. As to the second part: No one can avail himself of the services of the Inter-Insurance Bureau unless he [31] is a member of the California State Automobile Association.

Q. To that extent, then, the insurance service, while not furnished by the Association, is incident to membership in the Association, it is a privilege which is restricted to members of the Association?

A. It is not even extended to all members of the Association.

Q. Pardon me, but so far as it exists, it is a privilege of membership in your Association?

A. I wouldn't be able to answer that.

The Court: It is a privilege extended only to members?

The Witness: A. That is correct, it is a privilege extended only to members of our Association.

Mr. Licking: Q. Well, now, you furnish legal advice too, do you not?

A. I don't believe so.

Q. You don't? What were you talking about, traffic violations in court, advice as to the effect of statutes? I understood you to answer you did that.

(Testimony of Irving H. Kahn.)

A. I think I stated the service, sir, was one that if a member of our organization was involved in an accident either with a member or a non-member, we would attempt to adjust the financial responsibility between the two of them, and further, that where a member of ours is involved in an arrest under certain conditions we make an appearance in court to plead for him. [32]

Q. You don't consider those little items to be legal? Aren't those legal services? I asked you if you extended legal services to members and you said no. You now say you do furnish them. Is this lay advice or professional advice? Do you have attorneys for that purpose to advise them?

A. Again, sir, the matter of advice—I am again repeating, if a member is arrested for an infraction—

Mr. Licking: Oh, I will withdraw the question. I don't wish to argue the question. You used the word "advice". You say if the members are arrested or if the members are involved in an accident, that someone comes to adjust the situation. All I am interested in is finding out who this somebody is. Is it an attorney?

A. We have a staff of employees who are attorneys for that purpose, admitted to the Bar of California.

Q. I see. And they give this type of service that you have just described to your members?

A. Yes, sir. [33]

Q. And with reference to your servicing cars

(Testimony of Irving H. Kahn.)

on the road, and your relation to garages, you said something in that connection.

A. We contract with garages to render emergency road services to our members. The member receives that service, identifies himself and signs a tag showing the receipt of the services.

Q. You contract the garages?

A. We contract with garages. When that service has been rendered, at stated periods the garage bills us for the services rendered to our members, and we make the payment to the garage.

Q. And you bill your member?

A. We do not.

Mr. Licking: In other words, if the Court please, not that it would make any difference in the situation, I am wondering if by chance the court may be a member of the association.

The Court: I am not.

Mr. Licking: I know my wife is, but I don't think that would disqualify either one of us.

Mr. Deibert: I think not.

Mr. Licking: Q. That is in connection with the legal situation, in connection with service. Now, in the matter of this road service: As a practical matter—

Mr. Licking: I had hoped that the court was a member of the association. [34]

The Court: How is that?

Mr. Licking: I had hoped that the court was a member of the association so I wouldn't have to go through the activities here and the court could practically take judicial notice of them.

(Testimony of Irving H. Kahn.)

Q. If one of your members broke down on the road—

The Court: Many, many years ago I happened to be one of those attorneys to whom you made reference.

Mr. Licking: Q. Well, your member does not pay the attorneys? A. He does not.

Q. You pay them? A. Yes, sir.

Q. Your member does not pay the garage for the towing service; you pay them?

A. Yes, sir, we pay them.

Q. Well, now, is there any other service, that is, describing it in practical terms, that you can think of that you have not told the court about, other than legal advice, both in civil and criminal cases?

A. I am sorry, sir, I don't want to quibble over the word "legal advice".

Q. Now, wait a minute, I will withdraw that word, I don't want to get into that argument again, but you do hire attorneys?

A. We do hire attorneys. [35]

Q. And those attorneys do—

A. Adjust controversies involved in accidents and attempt to settle without going into court the action or damage claim, if I remember, claims that he was in the right and the other man was in the wrong.

Q. And that is something which you do not consider to be legal advice?

A. I wouldn't use the word "advice".

(Testimony of Irving H. Kahn.)

Q. You wouldn't use the word "advice". What would you use if you wouldn't use the word "advice"?

A. I would call it an adjustment service. I have never understood—

Q. A legal adjustment, right?

A. I wouldn't say—

Q. Well, these attorneys, again, isn't whatever they do legal? A. I hope it is, sir.

Q. Well, all right. Is not what they do service?

A. It is a service.

Q. Then it is legal service, rather than legal advice?

A. I answered the word I hoped their actions were legal actions. It is my understanding that if anyone had an accident that we—

Q. I didn't ask for your understanding. Are we agreed that what you did furnish is legal services? Do we agree on that? A. No.

Q. That is the word you used. [36]

The Court: I think you are wasting a lot of time, Mr. Licking. You have brought out from the witness what services were rendered. I think you will have to leave it up to me to determine whether they are legal services, if that is necessary.

Mr. Licking: That is true, but my idea was it was advice, and the witness does not like that word, and I was just trying to find some word he would use himself to describe it, and he contends the description of the facts is sufficient, and I guess legally he is right.

Q. Now, how about the criminal situation, or I

(Testimony of Irving H. Kahn.)

mean the traffic violations? What does your legal staff do for your members in that connection?

A. Someone representing the Association will appear in a remote place and enter a plea for someone who has been arrested, let's say, for going through a red light. The judge will assess the fine, the Association will pay the fine, and will bill the member for the money advanced to his account.

Q. Now, are there any more services than these you have mentioned?

A. To my knowledge, sir, no.

Q. If a member is in an accident or in a traffic violation your attorneys serve him as you have described, as you say?

A. In the event of arrest I understand it is limited to pleading guilty for the offender and accepting the fine.

Q. Do you advance the fine? [37]

A. They advance the fine and I reimburse it.

Q. You advance the fine to the member?

A. Pardon me?

Q. You advance the fine to the member?

A. They pay the fine into court and charge the member and collect from the member.

Q. What is the recreational and social aspects of your services?

A. Our membership is primarily made up of owners of pleasure cars. The services we render make it easier to make use of the highways, it makes it possible for them to go out on their days off and seek the recreation they are looking for.

(Testimony of Irving H. Kahn.)

We advise them as to road conditions, as to weather conditions, we advise them as to the best places to stay in, we furnish them with maps showing the best way to get there; while if they are in difficulty through a breakdown, to keep them from being stalled on the road for hours, as they used to be, we provide certain garages with which we have contracts that serve them; they will pull them off the road to the garage, and also these garages facilitate their getting parts for repairs. If they are involved in an accident we will try to minimize the disaster of the accident by trying to adjust it for them.

We certainly undertake a program of publicity on safe driving. We spend a great deal of money on the maintenance of safety controls to cut down the incident of accident, and it would seem to me that those do contribute to the pleasure, the [38] relaxation and the pleasure of the member.

Q. And social activities: I asked you two things; that, I suppose, is your explanation of the recreational activities of the members of your Association, that is the recreational activity of the Association. What about the social purposes?

A. We have no social activities.

Q. No social. What do all these what are termed services to your club members cost?

A. In normal years they cost—

Q. May I restrict the question to what did those cost during the years 1943 and 1944, the period under consideration here?

A. I would have to refer, sir, to the treasurer's

(Testimony of Irving H. Kahn.)

report to give you the figures involved, as to the expenditures by classification.

Q. My question isn't that. I asked what it cost the members.

A. I beg your pardon, sir. Our membership dues are \$12 per year, were in 1943 and 1944, and at that time a new member joining the association paid \$3 initiation, which applied only to the first year. Thereafter his dues were \$12 a year.

Q. This \$18 a year would take care of all the services rendered by the club to the members which you have described? A. How much, sir?

Q. 18—\$15 a year at that time for the first year, \$3 initiation fee, and \$12 dues.

A. That would depend on the break of conditions of the particular [39] year.

Q. Well, during these particular years was that the cost?

A. During these particular years we did not expend as much as \$15 per member per year.

Q. I didn't ask you what you expended, I just asked you what all these services cost the members during those years.

A. His dues, which were either 12 or \$15.

Q. Yes. In the first year it was initiation and membership. Is your membership in any way restricted?

A. Our membership is open on invitation and solicitation.

Q. Your membership is open on invitation and solicitation, what do you mean by that? I don't

(Testimony of Irving H. Kahn.)

understand that answer, your membership is open on solicitation.

A. We solicit our members, sir. We don't set up booths and ask every Tom, Dick and Harry to join.

Q. Well, I asked you if you have any membership requirements. In order for anyone to join you have to ask them to join?

A. I think, sir, we invite all people to join.

Q. Well, I mean as a matter of race, color, or creed.

A. No.

Q. Are there any membership requirements other than the fact that a person have a car, and no criminal record?

A. Well, I think the word "criminal record" might involve a record of reckless driving.

Q. That is what I had in mind. [40]

A. I believe—

Q. Would one matter of reckless driving prevent a fellow from joining your association?

A. It might, depending on the circumstances.

Q. What circumstances, that is, the nature—

A. I mean the nature of the thing, the nature of the offense, drunk driving.

Q. In other words, the mere fact a person has a traffic record would not prevent him from joining?

A. That would not prevent him from joining.

Q. In other words, he has to have something that is tantamount to a criminal record, you have to be convinced that he is criminally negligent?

(Testimony of Irving H. Kahn.)

A. I would say that the average owner of an automobile who has a car that is not too old, a man who seems to be of some responsibility in his community would be accepted to membership in the association, and probably would be solicited.

Q. Do you make any investigation of the person's standing?

A. Well, most of our members, I believe, come through references of other members.

Q. I asked you do you make—you spoke of a person of standing in his community. I am just asking you if you make any inquiry to find that out.

A. Well, I understand that a general application is made out, and the acceptance of the individual member depends on [41] the survey or review of that application.

Q. You understand that?

A. It is my recollection that that is the way it was done.

Q. That is the way it was done?

A. During 1943 and 1944.

Q. Isn't it a fact that anybody that has an automobile and has not a criminal record may join your association, irrespective of his social standing, his color, race, or creed? As a matter of fact, you haven't any social requirements?

A. We haven't any social requirements, but when we have an influx of strangers to a community we are very careful in including them.

Q. Did you exclude the Okies?

(Testimony of Irving H. Kahn.)

A. We did.

Q. You never made any color restrictions?

A. We have never adopted a policy.

Q. Pardon?

A. We have never adopted a policy.

Q. But you did exclude the Okies? Are you sure of that?

A. I am sure we had people from the South, and they may be both black and white, who came here during the immigration during the war and we refused to admit them to membership.

Q. Did you refuse to take them for any other reason than the fact that they did not have cars that were in proper operating order? It wasn't anything social? [42]

A. No, sir.

Q. It was due to the operative condition of their cars rather than the fact that they came from Oklahoma, or Arkansas?

A. I don't know of any person that was excluded because of the fact that—

Q. Well, let's put it this way: If a person has a car that is in proper operating condition and does not have any criminal record, that is all the requirements for membership?

A. Generally, yes.

Mr. Licking: May I have your Honor's indulgence?

The Court: Very well.

Mr. Licking: If your Honor please, this is Mr. Norton, agent of the Internal Revenue, who made the investigation.

(Testimony of Irving H. Kahn.)

Q. There may be other privileges of membership other than you have described to the court?

A. I think I have—

Q. But so far as you recall you have discussed them all?

A. We have discussed the major ones.

Q. We have discussed the major privileges of membership and we are agreed it is not a social organization, and you have described the recreational aspects to the court?

A. Yes, sir.

Q. What you consider were the recreational aspects. Now, there are certain assets, I take it, buildings; those are all reflected in your statements that are in evidence before [43] the court?

A. Yes, sir.

Q. Has a member, if you know, any right upon dissolution of your organization, should such a thing happen, has a member any right to participate in the distribution on dissolution?

A. I believe that he has.

Q. There is no provision in your bylaws for that participation on dissolution on the part of a member, is there?

A. I don't recall.

Q. When you say you believe that to be the fact that is the general understanding among your membership and the officers of the association?

A. I think it has been the understanding of the officers.

Q. That has been the understanding of the officers and you have been there for some 35 years as one of the officers?

A. Yes, sir.

(Testimony of Irving H. Kahn.)

Q. You feel that a member has that right in the event such a thing should happen?

A. Yes; he would get a brick out of the building.

Q. Yes, or a dollar out of the bank?

A. Maybe a dollar out of the bank.

Mr. Deibert: Your Honor, it seems to me that is a mere statement of a legal conclusion, and that the rights of the members are to be determined by the articles of incorporation.

The Court: No question about that. [44]

Mr. Licking: The reason for asking the question, your Honor, was that the by-laws were silent in that respect, and I was asking what the understanding was.

The Court: You are asking for the witness' legal conclusion.

Mr. Licking: I asked what the understanding of the officers were in that connection.

The Court: I think the understanding of the officers would be immaterial.

Mr. Licking: I think I have no further questions.

Mr. Deibert: I move that the testimony as to the understanding of the officers and the witness' own understanding be stricken.

The Court: As to this legal conclusion to which you have made reference?

Mr. Deibert: Yes.

The Court: Your motion is granted. Is that all from this witness?

Mr. Licking: I have no further questions.

(Testimony of Irving H. Kahn.)

Redirect Examination

Mr. Deibert: Q. Mr. Kahn, with reference to the services rendered to members if they are charged with any traffic violation, do the attorneys representing the association ever represent the member at a trial of such a case?

A. Not to my knowledge, sir.

Q. Also with reference to the Interinsurance Bureau, is that a [45] separate organization from the association, itself? A. It is, sir.

Mr. Deibert: That is all, your Honor.

Recross Examination

Mr. Licking: Q. Just a moment. With reference to the Interinsurance Bureau, can you state whether or not the member availing himself of that service secures insurance which ultimately costs him less than it would cost him if taken on the open market through a regular agency?

A. The Interinsurance Bureau endeavors to serve its members at cost, and if at the end of the year their income exceeds all expenses, payment of losses, and setting up of the reserves required by the State, in those years the member will receive a refund.

The Court: That is hardly responsive to the question. As I understood the question, it is whether or not the insurance costs the members less than they would have to pay elsewhere.

(Testimony of Irving H. Kahn.)

A. In the years in which the member receives a refund it will cost him less than his insurance would cost him in the so-called board or conference companies. It might not cost him less than it would cost him in non-board companies, or other cooperative insurance activities.

Mr. Licking: Q. In other words, this is a participating insurance, I take it? [46]

A. That is the practical effect.

Mr. Licking: I think I have no further questions.

Further Redirect Examination

Mr. Deibert: Q. Mr. Kahn, there are other interinsurance organizations from which your members, as well as other individuals, may obtain insurance under similar circumstances, are there not?

Mr. Licking: To which I object on the ground it is immaterial.

The Court: Sustained.

Mr. Deibert: That is all.

The Court: Gentlemen, it is about the time for recess. We can resume at 1:45, if that is convenient.

Mr. Deibert: That is agreeable, your Honor.

Mr. Licking: I will be glad to resume at 1:45.

(A recess was thereupon taken until 1:45 o'clock p.m.) [47]

Afternoon Session, June 25, 1947, 1:45 p.m.

Mr. Deibert: Q. Mr. Watkins, please take the stand.

DAVID E. WATKINS,

called as a witness on behalf of plaintiff; sworn

Direct Examination

Mr. Deibert: Q. Where do you reside, Mr. Watkins? A. My home address?

Q. Yes. A. Marin County.

Q. By whom are you now employed?

A. How is that?

Q. By whom are you now employed?

A. California State Automobile Association.

Q. Would you hear me a little better if I came closer? In what capacity?

A. Secretary and general manager.

Q. What is your business address?

A. 150 Van Ness Avenue, San Francisco.

Q. How long have you been employed by the California State Automobile Association?

A. Since 1913.

Q. How long have you been secretary and general manager? A. Since 1913. [48]

Q. Are you the D. E. Watkins who verified the complaint in the suit in which you are now testifying? A. I am.

Q. What are your duties as general manager and secretary?

A. Well, to supervise all the activities of the organization, particularly to ascertain the desires of the membership and formulate policies that are submitted to the board.

Q. Is the association incorporated?

A. Yes.

(Testimony of David E. Watkins.)

Q. On what date was it incorporated?

Mr. Licking: If the Court please, that is in the articles of incorporation.

The Court: That is in the exhibits.

Mr. Deibert: Pardon me?

The Court: That is in your exhibits.

Mr. Deibert: Yes, that is true, your Honor.

Q. Did you ever issue any stock to members?

A. Any which?

Q. Stock. A. No.

Q. Has your association ever qualified under the laws of California as a motor club? We have already introduced into evidence the certificate of—

Mr. Licking: Mr. Deibert, to which statute of California do you refer? I want it for the convenience of the court. [49]

Mr. Deibert: Yes, it is Chapter 2—no, Part 5, Motor Clubs, of the Insurance Code of the State of California, your Honor, beginning with Section 12140 of the Insurance Code.

Q. You have had these annual certificates issued to your association by the insurance commissioner every year, have you, since 1935, down to and including the present? A. That is right.

Q. Have any such certificates ever been rescinded? A. No.

Q. Is such a certificate still in effect?

A. Yes.

Q. Are you familiar with Part 5, entitled, "Motor Clubs", of the Insurance Code of California, defining a motor club and Motor Club Services in Sections 12142 and 12144, respectively?

(Testimony of David E. Watkins.)

A. I am.

Mr. Licking: What is the materiality? If the Court please, I object. What materiality has it if the witness is familiar with the laws of the State of California, or otherwise?

Mr. Deibert: Well, there are certain services enumerated which may be rendered by such clubs.

Mr. Licking: The law sets out the services.

Mr. Deibert: Yes, but some of them are not performed by this association.

The Court: Well, there may be vice in the question that [50] follows, but this is purely preliminary.

Mr. Licking: Well, his familiarity with it is entirely immaterial as to the law.

The Court: Well, preliminarily I will permit it.

Mr. Deibert: Q. Are you familiar with Section 12145 to 12156 of that Code? A. I am.

Mr. Licking: The same objection, if the Court please.

The Court: The same ruling.

Mr. Deibert: Q. Which of the services enumerated in Sections 12145 to 12156, inclusive, has your association rendered during the years 1935 down to the present time?

Mr. Licking: The question is slightly leading, but—

A. Tow service, emergency road service, map service, bail bond service, touring service, claim adjustment service, license service, and also a limited personal accident service insurance policy.

(Testimony of David E. Watkins.)

Mr. Deibert: Q. What was the type of your corporation as originally organized?

A. As a non-profit organization, with no stock.

Q. With no stock? A. How?

Q. No stock?

Mr. Licking: If the Court please, that is all in the articles of incorporation.

The Court: Yes. It is calling for a legal conclusion of [51] the witness, also.

Mr. Deibert: Q. Has there ever been any change in the type of your corporation as originally organized? A. No.

Mr. Licking: If the Court please—

Mr. Deibert: Explain the purpose of the association since you became secretary and general manager in 1913?

Mr. Licking: I object to that. The purpose of the organization is immaterial.

The Court: Oh, yes. I think you can go into the services it renders.

Mr. Deibert: Very well.

Q. What services has the club rendered during that period? A. The ones enumerated.

Mr. Licking: The witness just answered that question, if the Court please.

The Court: I suppose the purpose is to render those services.

Mr. Deibert: Well, there has been some slight change, your Honor, over the period of years, in the rendition of the—

The Court: You might ask him the question. what changes were made.

(Testimony of David E. Watkins.)

Mr. Deibert: Yes.

Q. Were certain services rendered in 1943 and 1944 during [52] the war period which were not rendered at other times?

A. Yes. The bail bond service, particularly.

Q. Well, what if any services were rendered in connection with the war effort?

A. Well, practically the Government had entree to all our services. We not only erected all the various signs like the Dim Out—

The Court: Can you stipulate that this witness' testimony would be the same or similar to that of the other witnesses in that respect, Mr. Licking?

Mr. Licking: I can stipulate to that very readily—

Mr. Deibert: With reference to the services rendered?

The Court: Yes, the additional services which were gone into quite copiously by Mr. Kahn.

Mr. Deibert: Yes, I think your Honor is right about that. If it may be stipulated that, with certain exceptions, however, about which Mr. Watkins is peculiarly—or with which he is peculiarly familiar.

The Court: Well, direct your attention—

Mr. Licking: What is there that Mr. Watkins knows that the other witness does not?

Mr. Deibert: Well, there are several things.

Mr. Licking: I won't object to a leading question if you go into those things.

Mr. Deibert: Q. What was the condition of the

(Testimony of David E. Watkins.)

highways in 1913, and in the early days of your association's existence? [53]

Mr. Licking: To which I object on the ground it is immaterial.

The Court: Overruled.

A. Well, as compared to today, they were deplorable in the West, and the only hard-surface roads used were in the cities. One of my first activities in 1914—

Mr. Licking: If the Court please, this does not even answer the question. I doubt if it is material in the first place, but this is not even answering the question. The condition of the highways in 1913 I will stipulate they were materially poorer than they are now.

A. Materially so, even in the cities.

The Court: I am interested in what was done in the association, if there was anything done in rendering service to the members in addition to those which have been testified to.

Mr. Licking: Yes.

Mr. Deibert: That is what I am trying to show, your Honor. This is a preliminary question.

Mr. Licking: What was done in 1913 and now has very little relevancy. We are concerned about a refund of a tax assessed in 1943 and 1944.

The Court: Well, possibly the history of the plaintiff will give us some index as to the services which were rendered during the tax year period in question. [54]

Mr. Deibert: We believe it is quite relevant for this reason, your Honor—

(Testimony of David E. Watkins.)

The Court: I have ruled in your favor.

Mr. Deibert: Will you answer the question?

A. What was the question?

Mr. Deibert: Will you read the question, Mr. Reporter?

(The reporter read as follows:

“Q. What was the condition of the highways in 1913, and in the early days of your association's existence?

A. Well, as compared to today they were deplorable in the West, and the only hard-surfaced roads used were in the cities. One of my first activities in 1914—”)

The Court: Restrict your answer to the services rendered by the association in remedying those conditions.

A. The association at that time appeared before various Governmental bodies. One of my first duties in 1914 was to appear before the city trustees of Mayfield, which is now part of Palo Alto, to have their main street, which is now 101, taken care of so in wet weather we could get through it.

The mountain roads in those days were like others with which we are all familiar, particularly the lake district and into Yosemite Valley, and they were in such condition that the association maintained tow trucks on the Big Oak Flat Road, the road into Tahoe on the other side—I forget the name of that grade near Placerville—all season, and likewise [55] on the Mariposa road. We even went into raising subscriptions to improve some of

(Testimony of David E. Watkins.)

these roads. Particularly I have in mind the Mariposa road, where at one meeting there were something like 2500. I am only mentioning that to show you the condition of the roads as they were then, compared with how we find them today.

Mr. Deibert: Q. What geographical area does your association serve?

A. The 45 northern counties of California and Northern Nevada.

Q. Was the same area served in 1943 and 1944?

A. It was.

Q. Are you familiar with the various activities of the plaintiff during the years 1943 and 1944, as well as other periods since you became secretary and general manager in 1913?

A. I am.

Q. Did you have any part in planning or establishing such activities?

A. Yes.

Q. What did you do in that connection?

Mr. Licking: To which I object as immaterial, as to what he had to do in establishing activities.

The Court: Overruled. What he did, is that your question?

Mr. Deibert: Yes, what he did.

A. Well, in my position, as I stated before, I had a much more [56] direct contact, and naturally, with the membership than the board of directors, not only in supervising the placing into execution of their various policies, but to go before them with possibly new policies, of which there were many during 1943 and 1944, with certain recommendations.

(Testimony of David E. Watkins.)

Mr. Licking: If the Court please, I move to strike that out as not responsive. It did not have anything to do with the question. He was asked what he did, and he has been talking about something else entirely.

The Court: I think it is responsive. Denied.

Mr. Deibert: Q. What were the activities of the plaintiff in the years 1943 and 1944 that were different from the other period?

Mr. Licking: Prior or subsequent?

Mr. Deibert: Prior and subsequent.

A. In 1943 and 1944 we had no finance department; we eliminated that prior to then; and neither did we have bail bond service. I don't know that there are any others that we eliminated. Of course, all our services during the war period were tremendously restricted through gasoline rationing and maintaining member services, such as emergency aid for touring, et cetera.

Q. Did you have to do more with the War and Navy Departments during the war period—

The Court: I understood counsel to stipulate the evidence would give in that regard as to the changes would be substantially [57] the same as Mr. Kahn's testimony, is that correct?

Mr. Deibert: Yes, your Honor.

Q. To whom were services of that nature rendered?

A. The members of the association.

Q. In your affidavit of November 5, 1941, Mr. Watkins, which is in Exhibit 1, there is in-

(Testimony of David E. Watkins.)

cluded on page 5, paragraph 8, Finance Department.

Mr. Licking: That is 1-D.

Mr. Deibert: 1-D, I think that is correct.

Q. That is the Finance Department that you say was eliminated? A. That is right.

Q. When?

A. I think it was—I wouldn't be positive on this, but it was February, I think, in 1942.

Q. In other words, you didn't have it in 1943 and 1944? A. No.

Q. Did you have any such—

A. I am not positive, but it was February, 1942.

Q. Have you had any such department since 1944? A. No.

Q. How many members did the association have on December 31, 1942? A. 104,352.

Q. On December 31, 1943? A. 108,601.

Q. On December 31, 1944? A. 116,929.

Q. Has your association received any letters since January 1, 1945, from the Commissioner of Internal Revenue, other than those included in the documents already stipulated in evidence, ruling on the question of your tax exempt status?

A. Well, I don't know which ones were stipulated—but no, I would answer that from my knowledge of them.

Q. Well, I show you—

Mr. Licking: May I see it?

Mr. Deibert: Certainly (exhibiting document to Mr. Licking).

(Testimony of David E. Watkins.)

Mr. Licking: These letters, if relevant, speak for themselves. There is no necessity of asking this witness about them. You can identify them. That is his signature, the deputy commissioner.

Mr. Deibert: Yes. Have you any objection to the introduction?

Mr. Licking: Yes. I don't see what they have to do with the case at all.

Mr. Deibert: Q. I hand you these letters—

Mr. Licking: I doubt if this witness can establish anything more than appears in the letters. The court can rule on the admissibility of the documents, but I don't see what the witness can do with them.

Mr. Deibert: These are letters I wish to present. [59]

Q. Do you recognize these letters?

Mr. Licking: I will stipulate that the letters were sent and received.

Mr. Deibert: Very well. I offer them in evidence, your Honor, as containing rulings by the Commissioner of Internal Revenue, in connection with the primary ruling in this case that the plaintiff in the case is an exempt organization. These letters refer to the rulings in some of the other letters which are already in evidence. For instance, the first one—

Mr. Licking: The letters, themselves, have to do with the capital stock tax. They haven't a thing to do with income taxes.

Mr. Deibert: They have to do with the capital

(Testimony of David E. Watkins.)

stock taxes, but they also refer to the other ruling of the Bureau, and they say further in this letter of January 25, 1945:

“In Bureau letter of December 23, 1944”—which is in the stipulation—“you were advised that you are not entitled to exemption from filing income tax returns under Section 101 of the Internal Revenue Code and the corresponding provisions of prior Revenue Acts. However, in order to avoid undue hardship, it has been held, under the authority granted by Section 3791(b) of the Code, that automobile clubs such as yours, which are within the scope of the Bureau rulings, will not be required to file returns of income for years prior to January 1, [60] 1943.”

The letter of the Commissioner of September 23—

Mr. Licking: What is the difference between that and the Commissioner's ruling?

Mr. Deibert: Well, the point is that the letters deny the application for refund of capital stock taxes, but tie up with the ruling in the letter of September 23, and they also recognize the fact that this association is a club—

Mr. Licking: Well, if the Court please—

The Court: Well, do they recognize it is a club within the meaning of this section 101 (9) of the Revenue Act?

Mr. Deibert: Yes.

Mr. Licking: The letters, if the Court please.

(Testimony of David E. Watkins.)

are for the purpose of this particular tax, the capital stock tax, and have nothing to do with income taxes.

The Court: Well, I am going to receive them.

Mr. Licking: Well, may I have an exception?

The Court: And I will consider the materiality after I read them.

Mr. Licking: May they be deemed read in the record?

The Court: Yes.

The Clerk: Do you want them as one exhibit?

Mr. Licking: May I have copies of them, Counsel?

Mr. Deibert: Pardon me?

Mr. Licking: Did you make copies of them? [61]

Mr. Deibert: Yes, I have copies, and if I may be permitted I would like to submit photostatic copies instead of the originals, and there is a set there for you—I think there are two sets there.

Mr. Licking: Let's get them in the record.

The Court: Do you offer these for any purpose other than to show the administrative interpretation?

Mr. Deibert: That is primarily the purpose, your Honor, yes, although they have a bearing on the former ruling, and the Bureau has ruled now that for income and capital stock tax purposes they are—

The Court: That is the only purpose, then, to show the administrative interpretation?

Mr. Deibert: Yes, your Honor.

(Testimony of David E. Watkins.)

The Clerk: How do you want these marked?

Mr. Licking: What is the exhibit number next in order?

The Clerk: No. 2.

Mr. Licking: Make this 2-A.

Mr. Deibert: 2-A, 2-B, and 2-C.

(The documents referred to were marked

Plaintiff's Exhibits 2-A, 2-B, and 2-C.)

Mr. Licking: 2-A is the letter of January 25, 1945.

Mr. Deibert: That is right.

Mr. Licking: And 2-B is the letter of February 23, 1945.

Mr. Deibert: Yes. [62]

Mr. Licking: And 2-C is the letter of August 21, 1945.

Mr. Deibert: That is right.

Mr. Licking: May I reserve an exception to the ruling?

Mr. Deibert: Q. Did your association ever pay any Federal income taxes for any year prior to those paid for the year 1943? A. No.

Q. Was your association ever called upon by the Federal Government to pay any income taxes for any year prior to those paid for the year 1943?

A. No.

Q. What services does your emergency road service department render?

Mr. Licking: If the Court please, we went into this with the other witnesses. It seems to me this is just cumulative.

(Testimony of David E. Watkins.)

Mr. Deibert: Your Honor, this is our position, if I may explain it: Mr. Kahn was president of the association in 1943 and 1944. He had also been a vice president and been a treasurer in earlier years, but he was never intimately—

The Court: I don't think there is a person in this room disputes the other witnesses that that road service is rendered. I think we are all conversant with it. I am quite sure Mr. Licking is conversant with it. It seems to me we are just taking time on something we all know exists.

Mr. Licking: The activities of the club are almost such [63] that on those matters—as a legal proposition I don't suppose the court can take judicial notice of them, but as a practical proposition—

The Court: I don't think you need more than one witness to prove it.

Mr. Deibert: We don't want to cumulate testimony, but—

The Court: Well, a matter like this that won't be controverted does not take corroboration, I don't think.

Mr. Deibert: Well, if that is your Honor's ruling —

The Court: Well: I don't want to be arbitrary about it, counsel, but I think that you are unnecessarily taking the time of the court and everybody to further pursue this line.

Mr. Deibert: May I ask just a few questions that were not answered by Mr. Kahn?

(Testimony of David E. Watkins.)

The Court: You may.

Mr. Deibert: Q. What type of automobiles belonging to members are eligible for emergency road service? A. Passenger cars.

Q. What amount of money did your association pay to commercial garages in your territory for emergency road service in 1943?

Mr. Licking: What is the materiality of that, Counsel?

The Court: Showing the services rendered.

A. In 1943 we paid \$199,325.

Q. In 1944? A. \$262,017. [64]

Mr. Licking: Doesn't that show on the statements that are already in evidence, Counsel?

Mr. Deibert: No, no it does not.

Q. When did your association begin the erection, maintenance and repair of signs on places of historical interest in your territory?

A. In 1914.

Q. Had any other organization done that work before you began it?

A. The Goodrich Tire Company had signs scattered, but they weren't standard—they were standardized, too, but they did not cover the roads and many of the mountain areas and so forth. No other extensively, to my knowledge.

Q. To your knowledge has any other individual or organization done any such work since the organization began to do it? A. No.

Q. What was the purpose of your association beginning and continuing this work over the years?

(Testimony of David E. Watkins.)

A. Well, for the recreational convenience and pelasure of our members.

Mr. Licking: That is objected to on the ground it calls for a conclusion of the witness.

A. We even went so far—on the El Camino Real in directing to the Missions — this was, I think, in 1914 or 1915—you still see many of them on the highways, the old Mission bell, and the first road starting, we marked the telephone poles between [65] Los Angeles and San Francisco—"L. A.", with an arrow pointing to Los Angeles, and "San Francisco" on the telephone poles, and from that the next step was the directors decided that a single agency to cover all county roads, municipal streets and State highways would add much to the comfort of our membership, and particularly in the mountain areas. In the mountain areas, usually in those days when you came to a fork of the road a sign meant something, and they recognized with all our resorts, where vacations and all were planned, that it would make a decided hit, so to speak, with the membership, and those are the real reasons why we went into the signing work.

Q. Is there any other organization or individual, to your knowledge, in California to furnish or does furnish information and services of the same scope as your association within your territory? A. No.

Q. Was there, in 1933 or 1934? A. No.

Q. Has your association, since your employment

(Testimony of David E. Watkins.)

in 1913, made efforts to obtain either favorable or restrictive legislation from the legislature?

A. Definitely, yes.

Q. Has it done any of that work with municipalities or counties?

A. Yes.

Q. What has been the result of that work?

A. Well—

Mr. Licking: If the Court please—

A. —from a State standpoint—

Mr. Licking: —it seems to me this is entirely immaterial. I don't see what it proves, how it touches any issue in the case, and it is purely a conclusion as to what has been established.

The Court: It seems to me that is immaterial. The service rendered is one thing, and whether it is effective or not would make no difference if an attempt was made to benefit the members in some way. The service is there whether it is successful or unsuccessful.

Mr. Deibert: Wouldn't it go to the efficiency of the service rendered, your Honor?

The Court: That would not necessarily follow.

Mr. Licking: If the Court please, I am perfectly willing to stipulate their services are efficient if you consider that relevant.

The Court: Pardon me?

Mr. Licking: I am perfectly willing to stipulate that the services that are rendered for the amount paid by the members are efficient. I don't think there is any question about that. It seems to me that for the sum of \$15 a year the first year, and

(Testimony of David E. Watkins.)

\$12 a year after that, for the services that have been enumerated here—they are very efficient in supplying [67] those services for that amount of money.

The Court: Does that suffice?

Mr. Deibert: Yes, your Honor, with that stipulation we will accept it.

Q. When was your licensing department established? A. In 1924.

Q. Was it in operation during 1943 and 1944?

A. Yes.

Q. What was the purpose of organizing that department?

A. For the convenience and pleasure of our members, and preventing them from waiting during the registration period to get these services.

Q. What functions does that department perform?

A. Well, they issue the original license plates to the members, and a block is assigned to us by the State, and those are given promptly to the members. We handle all the transfers of ownership and practically everything coming up under the Motor Vehicle Department with the exception of issuing operators' cards.

Q. Is this service extended to anyone other than members of the association? A. It is not.

Q. Does any net income come to the association from the operation of this department?

A. No, sir. [68]

Q. What services is rendered to your members by the adjustment and traffic department?

(Testimony of David E. Watkins.)

A. By the which?

Q. The adjustment and traffic department.

A. Well—

Mr. Licking: That has been discussed by the other witnesses.

The Court: Hasn't it been sufficiently described?

Mr. Deibert: Well, perhaps it has been, your Honor.

The Court: Unless you want to go into the question of legal services again.

Mr. Deibert: No, we have no such desire.

A. In a way—I heard Mr. Kahn's testimony this morning on this department—

Q. Is there anything you can add to it?

A. I can definitely add we do not represent members in court. I don't know that that was made clear this morning. In adjustments we represent them, which is all in agreement with the State Bar Association. We have had that agreement now for several years.

The Court: I am afraid we are getting into the subject of legal services again.

Mr. Licking: I am not amending my remarks in any way, but I don't see anything that could be considered that the association was engaged in the practice of law. [69]

The Court: I am glad that is eliminated from the case.

Mr. Deibert: Q. Do you publish a monthly magazine? A. Yes, sir.

Q. Did you publish that monthly in 1943 and

(Testimony of David E. Watkins.)

1944? A. Yes, sir.

Q. What was the name of the magazine?

A. Motorland.

Q. What was the cost of the publication in 1943? A. \$45,102.

Q. In 1944? A. \$47,050.

Q. Did you have any income from advertising in the magazine in 1943? A. No, sir.

Q. Or 1944? A. No, sir.

Q. Did income from advertising in the magazine cease after you had made your affidavit of October 5, 1941, which is part of Exhibit 1?

Mr. Licking: Just one moment—

Mr. Deibert: Reference is made in that affidavit to income from advertising, your Honor, and I simply want to establish that after that affidavit that was abandoned.

The Court: When was that abandoned?

Mr. Licking: That is 1-D. [70]

A. It was abandoned—I am not definitely sure on that—in 1941—

Mr. Licking: Counsel, again I make the offer; I haven't any objection to leading questions. If you take this exhibit, which is 1-D, and ask the witness a leading question as to the different activities I have no objection. The court has ruled, as I understand the court's ruling, that the witness' testimony is not material or relevant, except as to whatever conditions there are in his affidavit that the other witnesses have not testified to. I haven't any objection to a leading question if there are any other differences.

(Testimony of David E. Watkins.)

Mr. Deibert: I cannot concede that is a leading question, Mr. Licking; I am simply asking for the fact.

A. It was abandoned in 1941; the exact date I don't know.

Q. Why did you discontinue carrying any paid advertising in the magazine? A. When?

Q. Why.

Mr. Licking: I object to that on the ground it is immaterial why.

The Court: I don't see any materiality in it.

Mr. Deibert: Q. What was the circulation of the magazine in 1943?

Mr. Licking: That is immaterial, if the Court please.

The Court: If it is supplied to the members—

Mr. Deibert: That is what I am leading up to, your Honor.

The Court: Overruled.

A. 108,000 in 1943, and 114,000—that is, per month, in 1944.

Mr. Licking: That is to all of the members. Those figures seem familiar, if it is issued to each member.

Mr. Deibert: I am just about to ask that question.

Q. To whom is the magazine distributed?

A. To the membership of the club.

Q. What was the purpose of beginning the publication of such a magazine?

Mr. Licking: Object to the purpose, if the Court please.

(Testimony of David E. Watkins.)

Mr. Deibert: It seems to me that shows the beginning of one of the activities—

The Court: Overruled.

A. It was to keep our membership advised, not only of the activities of the association, but of all matters of interest arising in connection with the operation of their automobiles.

Mr. Deibert: Q. Did it have the same purposes in 1943 and 1944? A. Yes, sir.

Q. When was the magazine first published?

A. In 1917, as the California Motorist.

Q. Was the name changed later?

A. In 1919, to Motorland.

Q. Has it always been distributed as published to the entire [72] membership of the association?

A. Yes, sir.

Q. Is it still published and distributed to the members monthly? A. Yes, sir.

Q. Is it sold on news stands or otherwise to the general public? A. No, sir.

Q. Does it now have any income from advertising? A. No, sir.

Q. Did your association in 1943 or 1944 issue any memberships other than to individuals?

A. No, sir.

Q. Do you issue memberships to operators of trucks or other commercial motor vehicles?

A. No, sir.

Q. Have you ever done so? A. No, sir.

Q. Has your association ever rented any of its properties to tenants? A. Yes, sir.

(Testimony of David E. Watkins.)

Q. When?

A. When we moved into our new building here that we now occupy.

Mr. Licking: If the Court please, it seems to me that the activities should be confined to the time involved, not what they once did, but what they subsequently did. [73]

Mr. Deibert: We have stated in Mr. Watkins' affidavit of November 5, 1941—there was a statement that there was income of \$125 per month from a garage, and I am developing now that that was abandoned later on.

Mr. Licking: Why not ask the direct question? I have no objection to that.

Mr. Deibert: I didn't want to ask a leading question.

Mr. Licking: I said I have no objection; I would waive that just to save time.

Mr. Deibert: Very well.

Q. Did you ever rent a garage in connection with your property? A. Yes.

Q. What monthly rental?

A. Well, in later years, \$125 a month, at least that. It was more—

Q. When did you start renting that garage?

A. In October, 1941.

Q. Why did you stop renting it?

Mr. Licking: We object. What difference does it make?

The Court: Sustained.

Mr. Licking: It is immaterial why they stopped renting it.

(Testimony of David E. Watkins.)

The Court: Sustained.

Mr. Deibert: Q. Did you derive any profit from the rental of any property in 1943 and 1944?

Mr. Licking: To which I object. It calls for a conclusion [74] of the witness, was there any property rented. The question is, did you derive any profit?

Mr. Deibert: Very well.

Q. Did you derive any profit from rentals in 1943 and 1944?

The Court: Q. Did you rent any property?

The Witness: A. No, unless you construed—we didn't rent it. The Army took the sixth floor part of it by force and after a length of time they gave us twelve hundred dollars, I think, and that is all. Nothing outside of that.

Mr. Deibert: Q. Was it commandeered?

A. What?

Q. Was it commandeered?

A. Yes, definitely so.

Mr. Licking: What do you mean by "commandeered"?

Mr. Deibert: Q. Was it rented voluntarily or at your solicitation, or did the Army come in and say they wanted it?

A. They came in and told us they were going to take it, and we said, "Fine."

Q. What was the fee for new members in 1943 and 1944?

A. Annual dues of \$12, and the new member, \$15.

(Testimony of David E. Watkins.)

Q. What did the other three dollars mean?

A. That was enrollment fee or initiation fee.

Mr. Licking: That has all been testified to by the other witness.

Mr. Deibert: Q. Were there any memberships in your [75] Association other than those of individuals in 1943 and 1944? A. No.

Mr. Licking: The question has been asked and answered of this witness. He has already said they were not.

The Court: Overruled.

Mr. Deibert: Q. Was there any such membership since 1944? A. No.

Q. What amount of income was derived from such memberships in 1943, from members in 1943?

Mr. Licking: If the Court please, isn't that in the record already, in the statements?

Mr. Deibert: No, I beg your pardon, it is not, Mr. Licking. If it were I wouldn't ask that.

Mr. Licking: The income from memberships?

Mr. Deibert: No, not in the record.

A. I don't have that figure, but it is over a million dollars, a million three hundred, I think, in 1943, and a little more in 1944.

Q. Was it necessary for a hotel, garage or service station to take out a membership in the Association in order to be listed in the Association's guidebooks or lists of approved facilities?

A. When?

Q. In 1943 and 1944? A. No. [76]

Q. How were lists of such approved places of business obtained?

(Testimony of David E. Watkins.)

A. By our own employees through making inspections, which, of course, qualified them for the respective divisions that we set up, one-star, two-star and three-star.

Q. What was the purpose of approving and listing such places?

Mr. Licking: The fact that the witness just testified to, if the Court please, is in Exhibit 1-H, the income for that year, income tax returns.

The Court: You mean the income from members?

Mr. Licking: The income from members.

Mr. Deibert: I beg your pardon, your Honor. I had forgotten for the moment that we had introduced in the stipulation the income tax returns. I beg your pardon.

A. What was the question?

Q. What was the purpose of approving and listing such places?

A. Naturally it was for the convenience and comfort and pleasure of our members, particularly. We displayed a sign in front of each place when travelling through observation of the sign they would know the type of place it was.

Q. Did the sign so indicate?

A. Yes. We had ratings, one, two and three stars. One designating the luxurious types, like the St. Francis and the Palace, for example; No. 2, the less luxurious type, like the Stewart here in town. for example, and No. 3 was the [77] lesser types where accommodations could be had and it was a good clean hotel.

(Testimony of David E. Watkins.)

Q. What amount did your Association expend in 1943 for road-signing materials?

A. For the materials?

Q. Yes? A. In 1943, \$35,602.

Q. In 1944? A. \$33,735.

Q. Was the Association reimbursed in full for the cost of such materials?

A. Never received anything — the various branches of Government paid for that—but the Association bought them, naturally, and it was reimbursed by the various branches of government.

Q. That was my question. That is, you mean the State Government?

A. State, municipalities, federal and counties.

Q. Was there any element of profit in the purchase and use of such materials to your Association? A. No, sir.

Q. What amount did the Association expend in 1943 for erecting and maintaining road signs?

A. In 1943, \$98,005.

Q. In 1944? [78] A. In 1944, \$104,656.

Mr. Licking: That is all, if the Court please, over all of these years in the exhibits.

The Court: If it is, I see no occasion to go into it further.

Mr. Licking: I don't know what the purpose is.

Mr. Deibert: Well, these are not in the detail, your Honor, that I wanted to bring out by interrogation.

Mr. Licking: May I ask what is the materiality if there was \$54 or \$54,000 spent? What materiality is there?

(Testimony of David E. Watkins.)

Mr. Deibert: Well, we want to show how the money of the Association was spent.

The Court: I think that is proper.

Mr. Licking: But, if the Court please, the Association for this period has filed a detailed income tax return showing where they got the money and what they did with it.

The Court: If the details are in that, I see no purpose in going into it, but Counsel says it is not there.

Mr. Licking: Well, in this instance I have gone down there and found the exact figures.

Mr. Deibert: Q. Was the Association ever reimbursed by anyone latter expenses, that is, the labor expenditures? A. No.

Q. In 1943 and 1944? A. No. [79]

Q. What was the reason the Association made these expenditures without reimbursement?

Mr. Licking: If the Court please, that is immaterial, it seems to me, and calls for a self-serving declaration on the part of an officer of the corporation.

Mr. Deibert: It seems to me it is one of the services rendered by the Association, and that is one of the definite elements in this case.

Mr. Licking: Your question was not with reference to services, it was why did you do it. That is what your question was in effect, "Why did you do it?"

Mr. Deibert: Yes, what was the reason the Association made the expenditures without reimbursement? Why didn't they ask somebody to pay?

(Testimony of David E. Watkins.)

The Court: What difference does it make?

Mr. Deibert: It seems to me that the answer would bring out, your Honor, that this is one of the services which the Association historically has always rendered to its membership.

Mr. Licking: Well, that has been brought out, and I suggest it will come up afterwards in argument.

The Court: The picture is clear it was expended undoubtedly with the expectation of reimbursement by the political agencies.

Mr. Deibert: The point is this, your Honor, that the [80] road-signing materials, that is, the materials themselves the Association was reimbursed for by the State, counties, cities and smaller municipalities, but for the labor expended they were not.

Mr. Licking: That is stipulated. There is no question about that.

The Court: Yes.

Mr. Deibert: Q. Did the Association have any other income from other sources in 1943 and 1944?

Mr. Licking: Well, if the Court please, the source of income—they have filed an income tax return. It is all there.

Mr. Deibert: Very well, I will withdraw the question.

Q. What disposition is made of the annual income by the Association? A. Made of what?

Q. Of the annual income?

Mr. Licking: That question is answered by the statements that are filed.

(Testimony of David E. Watkins.)

The Court: Doesn't that answer it?

Mr. Deibert: Well, it is answered in so many figures, your Honor—

The Court: Well, not only the figures, but it is broken down as to the classification of expenditures.

Mr. Deibert: That is true. There are certain highlights, [81] however, I think, that have a pertinency.

The Court: Well, Counsel is not objecting to leading questions. If there is anything you want in the way of amplification of this item of expenditure, put your leading question.

Mr. Deibert: Well, that was just a general question.

The Court: Well, the general question is answered by this exhibit.

Mr. Deibert: To a large degree it is, yes, I agree with your Honor.

The Court: If you want to amplify it, you can ask leading questions.

Mr. Deibert: Q. Is there any way you want to amplify the list attached to the income tax returns, Mr. Watkins, as to your—as to the disposition of your annual income?

A. No. Our annual income is given and it has always been the policy to expend this money for services. Now, in 1943 and 1944 our services were definitely restricted. Through gasoline rationing we had to cut down emergency first aid, et cetera.

Mr. Licking: If the Court please, this witness

(Testimony of David E. Watkins.)

has made that identical statement now several times, and I am perfectly willing to stipulate their services were curtailed during the war years.

Mr. Deibert: Very well. [82]

Q. Has your Association ever paid dividends of any nature to any member? A. No.

Q. Has any income of your Association ever inured to the benefit of any member of the Association?

Mr. Licking: That calls for a conclusion of the witness.

The Court: Sustained.

Mr. Deibert: Q. Let me ask you this: Has any income of the Association ever been paid or credited to any member on your books? A. No.

Q. And have any provisions ever been made to pay or to credit any net earnings of the Association to these members? A. No.

Q. Has the Association any plan or purpose to distribute its net earnings so as to inure to the benefit of any individual member? A. No.

Q. Does any director of the Association receive any salary or other compensation? A. No.

Q. Did any officer as such receive any salary or other compensation in 1943 and 1944?

A. No.

Q. Has your Association at any time engaged in or made any [83] arrangement for its members to participate in any deal whereby members could obtain discounts on supplies or services of any character? A. No.

(Testimony of David E. Watkins.)

Q. Has it ever been a plan or policy of the Association to attempt to obtain any such discount for its members?

A. State that question again?

Q. Has it ever been the plan or policy of the Association to attempt to obtain any such discount?

A. No, no.

Q. Has your Association ever financed or helped to finance the purchase of automobiles by your members or anyone else? A. No.

Mr. Licking: If the Court please, what they did not do, it seems to me is not relevant. I can't see what the materiality of these questions, "You didn't do so and so".

The Court: I think so.

Mr. Deibert: I beg your pardon. If your Honor will read, as you probably will do later, this G.C.M., as it is called—General Counsel Memorandum issued by the Internal Revenue Bureau, on which the ruling in this case is based, you will observe in there mention that certain members of automobile associations have obtained discounts on the services rendered on behalf of their memberships. Now, it seems to me we should not be attacked by the Bureau on the [84] ground that we come within the purview of that ruling of the Commissioner of Internal Revenue without having any chance to explain that we do not do these same things.

Mr. Licking: If the Court please, the statement Mr. Deibert makes would illustrate that it is just what it is, it is argumentative. It hasn't any evi-

(Testimony of David E. Watkins.)

dentiary value; it shows nothing to the Court at all. It is merely argumentative. He can distinguish the Commissioner's ruling, I take it, but the time to do that is in the briefs and not with the help of this witness, whose testimony has been entirely a question of "I didn't do this and I didn't do that".

The Court: You have a peculiar situation here, that of determining the character of an organization, and I suppose the character of an organization is determined not only by what the organization does, but by what it does not do.

Mr. Licking: I am perfectly willing to stipulate, if your Honor feels it is necessary, that the Association here, as far as I know, did everything that is in the record here that they did do and did nothing else.

Now, to accentuate the things that they did not do is just argumentative. It seems to me there is utterly no sense to it.

Mr. Deibert: It seems to me, your Honor, we should be entitled to show what we did not do as well as what we did in order to show we do not come within the purview of that ruling. [85]

The Court: That is all right, if you want to go into that. Overruled.

Mr. Deibert: That is the purpose of going into it.

The Court: I understood Counsel to say he would stipulate—

Mr. Licking: I said I would stipulate they did

(Testimony of David E. Watkins.)

not do anything except what the record shows they did that is in evidence here.

The Court: I should think that would be sufficient.

Mr. Deibert: Very well, your Honor.

Q. Does your Association have a Board of Directors? A. Yes, sir.

Q. Has it always had such a board?

A. Yes.

Mr. Licking: Well, if the Court please, the articles of incorporation and bylaws and everything else of the Association are here, they are in evidence, and they are still operating under those.

The Court: Mr. Kahn so testified also. It is a matter that is not in dispute, apparently.

Mr. Deibert: Has the Board ever held meetings outside of its headquarters in San Francisco?

A. Yes.

Mr. Licking: What difference does that make? That is immaterial. [86]

Mr. Deibert: It makes quite a difference to us, Mr. Licking. We have been charged by the Bureau of Internal Revenue as not being a club organized within the purview of Section 101(9) because there was no commingling of members. That is one of the bases of the Bureau's ruling, and it seems to me, your Honor, we should be permitted to point out that those facts do not apply to our organization.

The Court: Go ahead.

Mr. Deibert: Will you read the question, Mr. Reporter?

(Testimony of David E. Watkins.)

The Court: Q. Did you have meetings of the Board of Directors outside of San Francisco?

The Witness: A. Yes, yes.

Mr. Deibert: For what purpose?

A. Well, before the membership grew to such proportions, we used to hold board meetings in the various districts and invite the membership in those districts in; but, as stated, the growth of the membership in recent years has prohibited such procedure.

Q. How many members are there on your Board of Directors? A. 21.

Q. How many were there during 1943 and 1944?

A. 21.

Q. Were all members of the Board members of the Association in those years?

A. Yes, sir. [87]

Q. Does the Board have regular times for meeting? A. Yes, sir.

Q. What are the times for meeting?

Mr. Licking: Isn't that in evidence?

A. The fourth Friday of every month.

Mr. Licking: Isn't that in evidence, Counsel?

Mr. Deibert: This goes to the question of whether or not the members ever get together for any purpose, and that is one of the fundamental bases for the Bureau's so-called adverse ruling.

A. The fourth Friday of every month.

Mr. Deibert: Q. Were special meetings of the Board ever held? A. Yes.

Q. Were there any such special meetings in 1943 and 1944? A. I don't recall.

(Testimony of David E. Watkins.)

Q. Did the members of the Board of Directors receive any compensation as such? A. No.

The Court: That was asked and answered.

Mr. Deibert: Pardon me?

The Court: That was asked and answered.

Mr. Deibert: Q. Are there any standing committees of the Association? A. Yes. [88]

Q. How many? A. Ten.

Q. Ten? A. Ten.

Q. Will you name them?

A. Finance Committee, E. B. Degold, Chairman—

The Court: We aren't interested in the chairman. The question is, what are the committees.

Mr. Licking: I will stipulate that a list of these be deemed read into the record and filed.

The Court: Do you have a list of them?

The Witness: A. Yes, it is a part of this. I can read them.

The Court: Read them.

The Witness: A. Public Safety Committee, Membership Committee, Good Roads Committee, Emergency Road Service Committee, Publicity Committee, Legislative Committee, Transcontinental Highway Committee, Forestry Committee and Executive Committee, with the chairman of each standing committee constituting the Executive Committee.

Mr. Deibert: Q. How many members does each of these committees have? A. Five.

Q. Were those the committees and the number of members on each such committee in 1943 and

(Testimony of David E. Watkins.)

1944? [89] A. They were.

Q. Do the members of the several committees receive any compensation as such members?

A. They do not.

Q. Can you describe briefly the duties and functions of each of these committees, are they contemplated in the name?

A. Well, they suggest the functions. They make studies of policy or activities, and then just before the meeting of the Board they meet and analyze them more thoroughly and go before the Board with their recommendations.

Q. When do the standing committees meet?

A. At the call of the chairman.

Q. Is there any contact, to your knowledge, or association between members of any of the committees between committee meetings?

A. Oh, definitely. If a subject comes up, particularly if it is of much importance—very frequently I happen to know of meetings of maybe a couple or three of them—particularly the ones residing, maybe, in San Francisco. The interior, no, unless they are in the city.

Q. Have the members of your Association the right to participate in the affairs of the Association?

A. Yes, sir.

Q. Did they have such right in 1943 and 1944?

A. Yes, sir. [90]

Q. Did they exercise such rights in 1943 and 1944?

A. Yes, sir.

Q. In what manner?

Mr. Licking: What was that question?

(Testimony of David E. Watkins.)

The Court: The participation of the members in these meetings.

Mr. Licking: I thought when I first heard it, it was a question of whether they did participate in the meetings or not. What was the question? Whether they had a right to or did participate?

The Court: No, did they participate.

Mr. Deibert: No, in what manner.

The Court: Nothing was said about right. Did they participate in such meetings?

Mr. Licking: The question is indefinite.

Mr. Deibert: Q. State in what manner did they participate.

Mr. Licking: In what, meetings?

Mr. Deibert: Well, in the affairs of the Association. That was the preliminary question.

Mr. Licking: The question is indefinite.

The Court: Let us see if the witness can make that definite by his answer. In what manner did they participate?

The Witness: A. In particular, in the annual board meetings. Notice is sent out at least sixty days, according to the constitution and bylaws, prior to the meeting, and they [91] are there expressing their views.

The Court: They are not all there?

The Witness: A. No, no. And we urge if they can't be present, in the notice, to name someone as their proxy, and we do have a great number of proxies.

Mr. Deibert: Q. And you send out such notices and proxies?

(Testimony of David E. Watkins.)

A. That is right, sixty days prior to the annual meeting.

Mr. Deibert: I should like to introduce in evidence, your Honor, a notice of annual meeting.

Mr. Licking: What difference does it make? There is one meeting a year in which the members may participate and express their views. That is one meeting a year.

Mr. Deibert: Q. Are there any other meetings in which the members have any voice?

A. They are not invited, but they are frequently in on special committee meetings like legislative. Members who are not a part of our board do sit in on those meetings.

Mr. Licking: They haven't any right to do so.

The Court: They are there by invitation?

The Witness: A. They are not barred, but if they express an interest in it, they are invited.

The Court: Q. But they don't get notice?

Mr. Licking: I am perfectly willing to stipulate they hold meetings every year in which the members can come to [92] if they want to and vote.

Mr. Deibert: This notice includes a form of proxy. I would like that in evidence.

Mr. Licking: No objection.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Deibert: Q. Has your Association a federation of automobile clubs? Do you have any member clubs? A. No, sir.

(Testimony of David E. Watkins.)

Q. Did it in 1943 and 1944? A. No.

Mr. Licking: Didn't Mr. Kahn go over that identical ground?

Mr. Deibert: No, I beg your pardon, he did not.

Mr. Licking: About member clubs?

Mr. Deibert: No, I don't think he mentioned that.

Q. Has it ever managed local automobile clubs?

A. No.

Q. Did it have any member clubs in 1943 and 1944? A. No.

Q. To your knowledge, how many federations of automobile clubs are there in the United States?

Mr. Licking: Which, if the Court please, is immaterial. I don't see what difference it makes.

Mr. Deibert: I want to bring out the distinction—

The Court: You want to bring out the distinction between this Association and other automobile associations?

Mr. Deibert: Yes.

The Court: Overruled.

The Witness: A. The American Automobile Association is our affiliate, but affiliated with that likewise are approximately six hundred other clubs throughout the United States.

Mr. Deibert: Q. What agreement does your Association have with such other clubs for services?

A. We recognize their membership card practically the same as ours when they are visiting in our territory. They are entitled to our emergency road service, map service—in fact, the services of all our

(Testimony of David E. Watkins.)

departments the same as our members are when touring in their respective territories.

Q. Are you connected with the California State Automobile Association Inter-Insurance Bureau?

A. Yes.

Q. That is a part of your Association?

A. No.

Q. Are members of your Association required to become subscribers to the Inter-Insurance Bureau? A. No.

Q. Do your Association and the Inter-Insurance Bureau occupy the same office quarters in any locality? A. In San Francisco--yes. [94]

Q. Where?

A. Well, in San Francisco and all the thirty-five district offices.

Q. Does the Inter-Insurance Bureau compensate your Association for the space it occupies?

A. Yes.

Q. On what basis?

A. We had a survey made of the entire building, the various floors, and the rental upon a square foot basis was given us by these experts, and the Insurance Department pays the Association for the space it occupies upon those bases.

Q. Has your Association ever made any profit out of sharing the quarters with the Inter-Insurance Bureau? A. No, sir.

Q. Does the Inter-Insurance Bureau share any other expenses with your Association?

A. Yes, sir.

(Testimony of David E. Watkins.)

Q. On what basis?

A. What is the question?

Q. On what basis?

A. Well, we operate—we have thirty-five district offices, and surveys at different intervals are made—or, rather, preceding that, the same staff represents the insurance activities the same as the club, and with the thirty-five offices, you can understand that we could not split some managers to [95] do the adjusting, like at Yreka and Susanville, which are principally service organizations, whereas other offices like Oakland has, for instance, six adjusters. So we make a survey of all these different offices at intervals and ascertain what part of the time of the employee they require and what space they would naturally occupy in those buildings, and then we come to an agreement upon the proper percentage of the cost of those offices that should be borne by each.

Q. How is reimbursement made by the Inter-Insurance Bureau to your Association for their share of the cost?

A. Each month by check.

Q. Is any profit derived by your Association from sharing expenses of any nature with the Inter-Insurance Bureau?

A. No, sir.

Mr. Licking: If the Court please, whether or not profit is derived is a matter of opinion of the witness. The books are in evidence here.

The Court: Sustained.

Mr. Deibert: That is all. Take the witness.

The Court: We will take the afternoon recess.

(Recess.)

(Testimony of David E. Watkins.)

The Court: You may proceed.

Mr. Licking: You have finished?

Mr. Deibert: Yes. [96]

Cross Examination

Mr. Licking: Q. Mr. Watkins, is it your testimony that this insurance agency is something entirely separate, distinct and apart from your Association? A. That is right.

Q. And this insurance agency which is entirely separate, distinct and apart from your Association, occupies the same offices and utilizes the same personnel? That is correct, isn't it?

A. That latter part you said, occupies?

Q. Occupies the same offices and utilizes the same personnel?

A. That is right—the same personnel, I don't get that.

Q. I mean, one does a part of this work for the insurance company and a part of this work for the—

A. Through the district offices, that is right.

Q. Now, in several of your answers there, that a lot of people, directors and other people did not receive any salary as such, I notice referring to Exhibit 1-H and 1-I, that there is a pretty sizable amount set down for salaries. For instance, referring to Exhibit 1-H, there is some eighty-seven odd thousand dollars down there. It is on Page 3, your Honor, of the attached statement. Some \$97,522.07 set down for salary. A. For whom?

(Testimony of David E. Watkins.)

Q. That is just what I was going to ask you.

The Court: Is this 1943?

Mr. Licking: It is Exhibit 1-H, your Honor.

The Court: You say ninety-seven thousand. The one I have for 1943 shows 523,000. 97,000 refers to automobile expenses, if I have the same statement you have.

Mr. Licking: Well, I thought, your Honor, that the first—that the first column—I see, the first column runs across—the first column there to \$749,000. That is correct. I hadn't got the columns. I think your Honor's statement is correct. Paid salaries of some \$523,000.

The Court: I though I would correct you. You said \$97,000 was sizable.

Mr. Licking: Well, what I want to get at is, is any of these non-compensated directors or other officers in this salary statement? For instance, yourself. You are a director, I take it.

A. No, I am not.

Q. You are not? A. No.

Q. Well, are any of the directors also employees? A. Not a one.

Q. None of them?

A. In fact, there is a ruling—one of the first requests I made when we only had a few members was that I would never be called upon to hire a director or a friend or relative of [98] a director.

Q. In other words, directors are not paid any salary as such? A. They are not.

Q. I notice in your answer you said, "As such they were not."

(Testimony of David E. Watkins.)

A. I will say as such, or any other way.

The Court: Well, you had in mind the expense of attending meetings?

A. No. If they go back on a meeting—like if the club wants them they pay their expenses, that it true, but outside of that, definitely no.

Mr. Licking: Q. In other words, they are paid their expenses in attending meetings, but as far as salaries are concerned they receive none?

A. That is right.

Q. When you said, “as such,” you meant they received no salary at all?

A. They are not being compensated in any manner.

Q. Now, you heard Mr. Kahn’s testimony on the stand? You heard Mr. Kahn’s testimony?

A. Well, most of it, yes.

Q. And I take it you agree with Mr. Kahn that there is no social intercourse or social mingling in the club?

A. I have been thinking that over. How do you interpret social intermingling of the members?

Q. I mean intermingling of the members as a club function. I [99] take it the members occasionally speak to each other and visit each other’s houses, but outside of the annual meeting, you have no other—

A. Well, outside of our annual meetings and the various meetings I previously described, then I would say no.

Q. What are the various meetings you previously described?

(Testimony of David E. Watkins.)

A. In 1943 and 1944, no, outside of our annual meeting. Prior to that time, as I stated, we used to hold our directors' meeting over the district, and invite the members in. Then if that was a social activity, which I assume it was, there was that social feature.

Q. Came in to talk over the business?

A. That is right.

Q. I mean you didn't hold any dances or you didn't raffle anything—

A. No, but we all took a run into Yosemite the next day.

Q. Pardon me?

A. I was talking about the Merced meeting, we all took a run into Yosemite the next day, the members and directors and all.

Q. Was that as a club, that trip when you went to Yosemite?

A. No, we were all on our own, that is correct.
Mr. Licking: I think that is all.

Redirect Examination

Mr. Deibert: Q. You said, Mr. Watkins, in answer to Mr. Licking's question, you used the same personnel in your offices. [100] I understood you also to state that is true in the district offices, but is that true in the San Francisco office?

A. No. I thought I made that clear. I said that was true in the district offices, but not in the home office.

Q. Yes. I hand you a statement of income and expense, which constitutes a part of Exhibit 1, it

(Testimony of David E. Watkins.)

is a portion of the affidavit of Mr.—it is 1-D—it is an exhibit to 1-D, and I call your attention to the fact that the second item there, “Special Memberships, Hotels, Garages, et cetera,” for the years 1940 back to 1932 on that page—

Mr. Licking: Page 2?

Mr. Deibert: Pardon me?

Mr. Licking: What page?

Mr. Deibert: The first page of the exhibit.

A. The second line.

Mr. Deibert: Of the exhibit in the affidavit, the exhibit to the affidavit. The statement right there on your desk, Mr. Licking.

Q. And I ask you whether you had such special memberships in 1943 and 1944. A. No.

Mr. Deibert: That is all. Mr. James W. Johnson, will you take the stand? [101]

JAMES W. JOHNSON,

called as a witness on behalf of plaintiff; sworn.

Direct Examination

Mr. Deibert: Q. Where do you reside?

3. 2701 Van Ness Avenue.

Q. By whom are you now employed?

A. California State Automobile Association.

Q. In what capacity?

A. Chief engineer in charge of road signing and map-making.

Q. What is your business address?

A. 150 Van Ness Avenue, San Francisco.

(Testimony of James W. Johnson.)

Q. How long have you been employed by California State Automobile Association?

A. Since 1914.

Q. How long have you been chief engineer?

A. Since 1914.

Q. What are the functions of your road signing department?

A. The erection and maintenance—

Mr. Licking: If the Court please, they have asked this question now of two witnesses.

Mr. Deibert: There are certain details, your Honor, that I think this witness and only he can testify to.

Mr. Licking: What is the materiality of the details?

Mr. Deibert: Well, the details go to show what services were rendered to the members of the association, and that is one of the matters— [102]

The Court: Is there anything you can tell us that has not been testified to by the preceding two witnesses in reference to services rendered in the road signing department?

A. In general, I probably could not add to it, but in detail there is probably detail that I could.

Mr. Licking: What is the materiality of the details?

Mr. Deibert: The detail, your Honor, will show just exactly how the members were benefited by the erection and maintenance—

The Court: If there is anything you can add I will hear the witness.

(Testimony of James W. Johnson.)

Mr. Licking: How will this witness testify to how the members were benefited, if the Court please?

The Court: He can't very well testify to that, but he can elaborate on the testimony as to the services that the other witnesses have given.

Q. Is there anything you can give us with reference to this particular service beyond that which the other two witnesses have testified to?

Mr. Licking: If the Court please, there isn't any issue in the case as to the adequacy or inadequacy of the services here. The only question in issue here, as I explained beforehand, was whether this is a service club, a social club for pleasure and non-profit services. I think the services given are quite adequate. It seems to me they are more than adequate for the [103] money.

The Court: It seems to me that what has been testified to in this record should be sufficient. But if counsel wishes to go into it further I will hear it.

Mr. Licking: If counsel will say what this witness will testify to I think I can probably stipulate to it for the record.

The Court: Very well.

Mr. Deibert: I don't know that I can do that, your Honor, but I think the witness, himself, can give us the details.

The Court: I have asked the question what—I will repeat it to him: Is there anything you can add to the statements made in the testimony given by the two previous witnesses as to the road signing service of the club?

(Testimony of James W. Johnson.)

A. We have added materially to the National Uniform Code for Highway Signing, which is particularly a national problem rather than a State, which is a service to not only California, but all motorists, for one point.

Mr. Deibert: Q. What do you do—

The Court: Anything else?

Mr. Deibert: Pardon me?

The Court: Anything else?

A. Nothing in general, no.

The Court: Well, specifically, if there is anything you can add you may do so.

A. I can't think of anything— [104]

Mr. Deibert: Q. What do you do with respect to the replacement—

Mr. Licking: Remind him of something. The witness has said he does not know of anything himself. I wonder if you can remind him of anything.

Mr. Deibert: Yes, I think I can.

Mr. Licking: Go ahead and ask him.

Mr. Deibert: What, if anything, does your department do with reference to maintaining, cleaning, repairing and renewing road signs?

A. We have fourteen trucks that spend 75 per cent of their time in making repairs to signs, cleaning and repairing posts, and doing all work to improve the appearance of the sign, and all this work is done with members' dues taken from the association, without any reimbursement, at all.

Q. Just what appears on these road signs?

A. They are road signs of different types, park-

(Testimony of James W. Johnson.)

ing signs, restriction signs, signs for resorts, signs for places of historical value. We are now engaged in special historical signs for this 100-year convention or celebration that is to be held.

Q. Who bears the cost of manufacturing the road signs?

A. The California State Automobile Association.

Q. Do you also bear the cost of erecting and maintaining them? A. Yes. [105]

Q. What amount did the association spend out of its own funds and not reimbursed by State or local authorities for road signing work during the years 1943 and—'43 first.

Mr. Licking: If the Court please, this is entirely immaterial, the amount that was spent. I can't see what it has to do with the issues.

The Court: Overruled.

A. \$61,571.

Mr. Deibert: Q. In 1944. A. \$64,178.

Q. Were those normal amounts to spend for those purposes? A. No, they were not.

Q. Will you explain that?

A. The reason being that we were expanding our services for war efforts, trying to economize on labor and materials. Of course, labor and materials were difficult to get and we were also trying to avoid the erection of any signs that were not absolutely essential. Most of our work during those two years was confined to war work rather than to the general directing of traffic.

(Testimony of James W. Johnson.)

Q. Did you do any material road signing in war work?

A. Yes, we handled all of the dim-out work, involving some 8000 dim-out signs for the Army. Of course, there was a lot of damp work—

Mr. Licking: If the Court please, this is a patriotic gesture, but I can't see what materiality it has to the case. [106]

The Court: It has some bearing on the non-profit feature.

Mr. Licking: Well, if the Court please, the figures are there. This is simply an explanation of an item that is already there. I can't see what bearing it has on profit. There isn't any contention that this was something new that just occurred to them. These deductions are taken for that. These income tax returns are filed. It is in there.

The Court: Overruled.

Mr. Deibert: Q. Are you familiar with the joint committee on uniform traffic control devices?

A. Yes, I am.

Q. Describe the organization of that committee.

Mr. Licking: What materiality has that?

Mr. Deibert: It is another function of the Association.

Mr. Licking: Ask the question.

Mr. Deibert: This gentleman is very familiar with it.

Mr. Licking: That is another activity?

Mr. Deibert: That is another activity, yes.

Mr. Licking: All right, I will stipulate to it.

The Court: I will allow it.

(Testimony of James W. Johnson.)

The Witness: A. It is an organization composed of representatives of the American Association of State Highway Leaders and a member from the Association of Traffic Management, and a member from the National Conference of Street and Highway Safety, and it is headed by the Deputy Director [107] of the Bureau of Public Roads at Washington.

Q. Are you a member? A. Yes, I am.

Q. What functions does the committee perform?

Mr. Licking: Again, if the Court please, I renew the objection. This is entirely irrelevant.

The Court: Well, whatever the plaintiff in this case does would be relevant.

Mr. Deibert: This is an activity of the Association, your Honor, of the plaintiff acting through this witness here, which is carried on at the expense of the Association.

The Court: Q. Well, what is done by you as the Engineer of the California State Automobile Association in that respect?

The Witness: A. I attend different meetings regularly in Washington, where we design standard uniform traffic control devices.

Mr. Licking: I take it the question to ask is—the question is, who pays for that. Is it paid for by the Association?

A. Yes, they pay my entire expenses involved in this work.

Mr. Deibert: Who pays for the drafting and preparation of maps distributed to members of your Association?

(Testimony of James W. Johnson.)

A. California State Automobile Association.

Q. Have you any part in it? [108]

A. Yes, I have charge of that work.

Q. How many people are employed in that work? A. We have five full-time draftsmen.

Q. Are they constantly making and revising maps? A. Yes, they are.

Q. Who pays the expense of such work?

A. California State Automobile Association.

Mr. Deibert: Take the witness.

Mr. Licking: I have no questions.

The Court: That is all.

Mr. Deibert: Mr. Duke.

CECIL H. A. DUKE,

called as a witness on behalf of the plaintiff; and being first duly sworn, testified as follows:

Direct Examination

Mr. Deibert: Q. Where do you reside?

A. 1120 Union Street, San Francisco.

Q. By whom are you now employed?

A. The California State—

Mr. Licking: Counsel, what is intended to be proved by this witness? I probably will be able to stipulate to it.

Mr. Deibert: No, I don't think you can, I am sorry, but we expect to get some details in here that I can't remember myself that I think have a very direct bearing on the very [109] issue in this case, your Honor.

Q. In what capacity are you employed?

(Testimony of Cecil H. A. Duke.)

A. Assistant Manager of the Touring Bureau.

Q. At what address?

A. 150 Van Ness Avenue.

Q. How long have you been employed by the Association?

A. Sixteen years.

Q. How long have you occupied your present position?

A. Sixteen years, sir.

Q. What are your duties?

A. My particular duty is to oversee the entire function of the Touring Bureau, to see that the activity is carried out properly. My particular crew has the responsibility of attending to all of the wants—issuance of maps to our members who are going on their vacation trips throughout the year.

Q. What maps does the Touring Bureau distribute to your membership?

A. A very great number, your Honor, of maps of the western part of the United States.

Mr. Licking: Well, if the Court please, it seems to me the fact of the services is material; the extent is immaterial. They furnished such services; there is no argument about that.

The Court: Overruled. [110]

The Witness: A. Very, very extensive, your Honor. United States maps, maps of the western United States, maps of individual states, maps of the various parks that we have in the West, maps of the new Alcan Highway to Alaska, maps of the Pan-American Highway, and so on. In addition to sectional maps we have strip maps and strip-tease maps.

(Testimony of Cecil H. A. Duke.)

Mr. Licking: Strip-tease?

Mr. Deibert: Q. Does your Bureau distribute to your membership lists of hotels, lodgings, restaurants, and so forth?

A. We do. Not only a list of hotels and motor lodges in the western United States, but also an additional list covering the whole United States giving the accommodations that are available throughout this country and Canada.

Q. Does the Touring Bureau have available for members any other information?

A. Yes, a very large source of information which we have compiled over a number of years.

For your Honor's information, in the course of a man's inquiry regarding his vacation trip, there is a great deal of information that he must have and which the average person does not have. He wants to know where he will stay, what roads he is to go over, what conditions he will encounter on the road, what facilities are available for camping, what the fishing conditions are in the immediate area in which he [111] plans to travel, what restrictive seasons are imposed insofar as open and closed seasons, and so on. That information is all vitally important to him and he cannot know it beforehand unless he himself has spent in the immediate area a considerable amount of time.

Q. Does the Touring Bureau supply any publications to keep the members informed of road conditions throughout the state?

A. Yes. Not only do we have a daily bulletin which gives a recap of the pertinent information

(Testimony of Cecil H. A. Duke.)

concerning the entire west, but we also have bulletins covering the entire United States, and for that matter, Canada, and furthermore, particularly during the winter months when it is all imperative to know about particular conditions on a particular road, we resort to telephone or telegraph to acquire that information and file it so it will be available when a member asks for that information.

Q. What, if anything, does the Touring Bureau do with respect to rendering automobile registration service?

A. We do that. That again is a very, very great convenience to the members.

If your Honor has any knowledge of the tremendously long lines that line up outside the Department of Motor Vehicles during the renewal period, you can appreciate that our members certainly gain comfort from the fact that they can come into our office and without waiting in line have their [112] license plates issued to them. Furthermore, in addition to merely issuing of a new license plate in any particular year, motor vehicle transactions oftentimes become very, very complicated. We act as a buffer in aiding the member to unravel those. I might add that sometimes the unraveling takes a considerable number of days and even months. That service is rendered the members and almost, I can say, more efficiently than the Department of Motor Vehicles can do it.

Q. Do you have any publications detailing the changes in road conditions throughout the United States?

(Testimony of Cecil H. A. Duke.)

A. Yes, we do. Again we have a daily bulletin, we have a monthly bulletin, and during periods of severe weather we have telegraphic bulletins available to all our members.

Q. Is there any other information you issue to members that you have not enumerated?

A. Yes. Most of our vacationists, or shall I say, a good percentage of our vacationists want to go hunting or fishing. We take it upon ourselves to acquire through our district officers and affiliate clubs accurate and uptodate information of local conditions, particularly in this last season, when it has been most important even to old-time fishermen to know what closures are in effect so they won't be undesignedly fishing in a stream that is closed. We have digest rulings from all the departments involved, and we keep them on file and accurately distribute to the members such information. [113]

Q. Does the Association make any charge for giving out this information to the members?

A. None whatsoever.

Q. Are you able to state the average annual number of calls, both personal and by telephone, answered by your Touring Bureau during the last five years?

A. Will you please state that again?

Q. Are you able to state the average annual number of inquiries, both personal and by telephone, answered by your Touring Bureau during the last five years?

A. Your Honor, if I can consider a second I

(Testimony of Cecil H. A. Duke.)

can give you a pretty close figure. I would say, and I believe I am being conservative in saying so, that we must handle a minimum of a half-million inquiries a year.

Mr. Deibert: Take the witness.

Cross Examination

Mr. Licking: Q. Is this definite information you have as experts along those lines?

A. We consider ourselves, shall we say, not experts, but qualified, sir.

Q. Who is the man that handles your fishing end of it? A. I beg your pardon?

Q. Who is the man that is your fishing expert?

A. A man by the name of Joe Kelstrom, sir.

The Court: You have your vacation in mind?

Mr. Licking: I haven't any further questions.

Mr. Deibert: That is all.

Mr. Licking: That is the only important question I can think of.

Mr. Deibert: Mr. E. S. Moore.

EDWIN S. MOORE,

called as a witness on behalf of the plaintiff; and being first duly sworn, testified as follows:

Direct Examination

Mr. Deibert: Q. Where do you reside?

A. 334 Bixby Street, San Francisco.

Q. By whom are you now employed?

A. California State Automobile Association.

Mr. Licking: Mr. Deibert, again I will make

(Testimony of Edwin S. Moore.)

my same request, I just want to know if this is more of the same thing.

Mr. Deibert: No. No, this is on a different line.

Q. In what capacity?

The Court: I thought you were going to offer to stipulate.

Mr. Licking: I was.

The Court: If Counsel will state what he intends to bring out by this witness—

Mr. Licking: I probably would, but he said it was a [115] different deal.

Mr. Deibert: It isn't too long, your Honor, but it is one of the important activities of the Association.

The Court: I thought you might state to Counsel what you expected to prove by this witness.

Mr. Licking: I probably will be able to stipulate to it.

Mr. Deibert: This witness, I think, when he answers my question will indicate what his line of activities is very briefly.

The Court: Very well.

Mr. Deibert: Will you answer the question?

(Question read.)

A. I am Manager of the Public Relations Department of the California Automobile Association, which includes the activities of the Association, including its public safety work, its highway activities, and its legislative activities.

Q. What is your business address?

A. 150 Van Ness Avenue, San Francisco.

Q. How long has you been employed by the

(Testimony of Edwin S. Moore.)

Plaintiff? A. Now in my 21st year.

Q. How long in your present position?

A. Since 1932—not the present department—I would correct that—as assistant to the head of that department, but head of that department for the past five years.

Q. Who directs the Public Safety Department for the Association? [116]

Mr. Licking: If the Court please, what is the materiality of who directs the Public Safety Department?

Mr. Deibert: It is a part of the picture of the work that is done and a very important work.

The Court: He may answer.

The Witness: A. The Public Safety activities of the Association, of the Automobile Club, come directly under the Public Safety Committee of the Board of Directors. I am in charge of carrying out the activities themselves as an employee of the California Automobile Association.

Mr. Deibert: Q. What was the purpose of establishing your Public Safety Department?

A. The Public Safety Department of the Automobile Club was organized to carry out one of the functions—

Mr. Licking: It has something to do with public safety, I take it. I will stipulate to it.

Mr. Deibert: It has to do with public safety, but I would like the witness to answer, if I may, your Honor.

The Court: Yes.

(Testimony of Edwin S. Moore.)

Mr. Licking: After all, the witness can't testify as to the purpose, if the Court please.

The Court: Well, tell us what you do in that regard?

The Witness: A. The Automobile Club conducts many safety activities. Starting with the grade school levels, the Association sponsors and develops and presents materials for [117] safety educational work, starting at the kindergarten level and through the various grades of the elementary schools, and into the high schools and college levels.

Q. What safety services does the Association render to the elementary schools?

A. Starting with the elementary schools and beginning with the kindergarten classes, the Automobile Association prepares and distributes crayon lessons for the very young children in traffic safety and kindred problems of safety, and with the grade schools, that is, from the first grade up through the eighth, safety posters and safety lessons are distributed.

Q. How many safety posters and lessons were distributed through 1943 and 1944 to the elementary schools in California and Nevada, which is your territory?

A. In 1943 and 1944, due to the war situation the number of safety posters and lessons distributed by the Automobile Club were cut in half. During those two years we distributed instead of eight issues each school term, we distributed four issues

(Testimony of Edwin S. Moore.)

each school term, consisting of 15,000 safety posters each month and a corresponding number of safety lessons.

Q. That was each month?

A. They were distributed in sufficient quantity—there were only four issues in each of those two years, instead of the customary eight. [118]

Q. What did these safety posters and lessons contain?

A. The safety posters depict some particular traffic hazard which we feel is desirable to emphasize, and the lessons which accompany the posters demonstrate the proper and correct way of meeting that particular hazard and condition. The posters and lessons are designed for use by the pupils and the teachers of the grade schools to enable them to better understand the problems involved in traffic safety and to meet the daily traffic situations as they occur.

Q. What is the reaction of teachers and principals to this work?

Mr. Licking: Well, if the Court please, this is purely irrelevant.

The Court: I think so. Sustained.

Mr. Deibert: I beg your pardon? I didn't hear that.

Mr. Licking: I objected on the ground it was irrelevant, and he sustained the objection.

Mr. Deibert: I see.

Q. Have you knowledge of the results of this program?

(Testimony of Edwin S. Moore.)

Mr. Licking: Same objection, if the Court please.

The Court: Sustained.

Mr. Deibert: May I say this, your Honor—I, of course, respect your ruling, but it seems to me we ought to be able to develop here whether or not this activity of the Association is a worthwhile activity, whether it is doing anything [119] for the communities in safety—

The Court: Oh, it is axiomatic it is worth while. I don't see any occasion to develop that further.

Mr. Licking: I will stipulate — if the Court please, I am perfectly willing to stipulate that a safety program is a worthwhile activity.

Mr. Deibert: Q. Does the Association participate in the operation of school safety patrols?

A. Yes. The Association sponsored and developed the idea of school safety patrols as far back as 1923, when the first safety patrol was organized in San Francisco.

Q. What is the function of the school safety patrols?

A. The school safety patrols' sole purpose—the main purpose, at least, of the school safety patrol is to take certain of the more responsible students in a school and train them to guard and protect their classmates at street crossings in and about the neighborhood of the schools, thereby instructing younger children in the safe and proper way of crossing streets and the proper locations or proper crossings to use.

(Testimony of Edwin S. Moore.)

Q. What materials are furnished school safety patrols?

A. The Automobile Club furnishes white Sam Browne belts, identification cards, special certificates of award at the close of the term which the young patrol members are serving, and also certain awards for the schools themselves where the [120] boys have been most efficient in their operation.

Q. Is there any charge made for the safety posters and lessons or other materials you have mentioned?

A. The Association furnishes all these materials I have mentioned without any charge.

Q. What activities does the Association carry on in high schools and colleges?

A. Again, the Association has been instrumental in sponsoring a program for driver education in high schools and colleges in California.

Q. What materials are used in this program?

A. The Automobile Club has developed a course for high school use called "The Driver of Tomorrow", that is published by the club and furnished free of charge to the high schools in our territory.

In addition the American Automobile publication known as "Sportsmanlike Driving", which is probably the most comprehensive and complete textbook on the subject of driver training in the United States and widely used throughout the United States, is also distributed by us.

Q. How many high schools in California have courses in driver education?

(Testimony of Edwin S. Moore.)

Mr. Licking: If the Court please, this is getting too far afield.

The Court: Overruled. [121]

The Witness: A. In the past year a survey indicated that over three hundred high schools in California here had held classes in either driver education or driver training, or both phases of that subject.

Mr. Deibert: Q. Does the Association conduct any traffic surveys?

A. Yes. The Association also has a traffic survey service.

Q. What is the nature of that service?

A. A traffic survey service is a service which is available to cities, communities and organizations where the organization or the community itself does not have sufficient funds to employ its own traffic engineers, but they do have traffic problems of one type or another, usually involving or affecting the handling of traffic in the community or the safety of traffic in the community, and in this connection the Automobile Club will undertake a traffic survey at its own expense for the community and develop plans and recommendations to meet their problems and in turn assist the community in putting those recommendations into effect.

Q. Do you make any charge for this service?

A. There is no charge for this service.

Q. Have you participated personally in any attempts to obtain legislation from the state legislature affecting motorists?

(Testimony of Edwin S. Moore.)

A. Yes. Among my other duties I happen to be legislative [122] representative of the Association.

Q. Has that been carried on to any great extent in the past few years?

A. Yes. The Automobile Club has been very active through the years and at the present time in the development of adequate and sound motor vehicle legislation and also in the development of sound and adequate highway improvement programs. The record will show, and I know personally since the time I have been in the Automobile Association, because I have participated in many of those programs myself, that we have been most active in developing the highway programs which have meant so much in the development of our highway system in California.

Q. Have you done anything of a similar nature with respect to local ordinances?

A. Yes. Again the Automobile Association has undertaken to promote a uniform traffic code for all cities so that motorists travelling—our members and others travelling from one community to another might meet with the same general local traffic regulations in whatever community they might be.

Q. Did your Association in 1943 and 1944 have any connection with a National Pedestrian Protection contest?

A. Yes. We sponsored that contest in California in both of those years. [123]

Q. What did you do in that connection?

A. We enrolled cities throughout the State in

(Testimony of Edwin S. Moore.)

the Pedestrian Protection contest, also the State of California. Of course, the purpose being to again bring to the attention of the authorities and to the public, as well as our members, the problem involved in the pedestrian hazard.

Our studies demonstrated that in the larger cities approximately three out of four traffic fatalities involved pedestrians, and in the smaller cities approximately fifty per cent of fatalities involved pedestrians.

Mr. Licking: If the witness is reading from a report, I have no objection to putting the report in.

The Witness: A. I am not reading from anything.

Mr. Deibert: He is not reading anything.

A. No, I have here a number of files I brought with me showing the materials—

Mr. Licking: I was just thinking if you had some report it could go in. I haven't any objection to its being deemed read into evidence.

The Witness: A. I was addressing myself to the Pedestrian Protection contest and the activities which the Association engaged in in connection with the particular program designed to help provide greater protection to pedestrians, because, as I indicated, our members are both pedestrians and drivers on occasion, and since the pedestrian hazard is a most serious [124] one, we felt it was a worth while activity to provide as much aid physically as could be offered and to do as much educational work as we could do in that field.

(Testimony of Edwin S. Moore.)

Q. Does your Association do any of that work by radio?

A. Yes. We have a series of weekly radio programs on safety work.

Q. Will you describe in a little more detail what you do in that connection?

A. In the years 1943 and 1944—I will address myself to those particular years—we had three regular weekly fifteen minute safety radio programs over radio stations in our territory, which is northern and central California. Those programs were presented as public service programs in the interest of public safety jointly by the radio stations participating and the Automobile Club, the radio station donating its time and facilities and the club preparing material for broadcasting purposes and presenting the programs in that particular field.

Q. Does your Association do anything with respect to films in connection with safety work?

A. Yes. We maintain a film library, a safety film library, and distribute safety films to teachers, schools, clubs and groups interested in traffic safety and the problems involved on the streets and highways, and ways and means of overcoming those problems. [125]

Q. How many films do you have in the library, do you know?

Mr. Licking: It seems to me how many films is not relevant.

The Court: Overruled.

The Witness: A. I might refer to a list which I brought with me, because I don't know if I can

(Testimony of Edwin S. Moore.)

recollect offhand, but we do have, I would say, about—well, I can give you it precisely. There are 23 films on our film list which we maintain.

Mr. Deibert: Q. And are they distributed for use throughout your territory?

A. Yes, they are available without charge to any organization, group, school or college, or any individual who would like to have a film on traffic safety.

Q. Does the Association engage in other safety programs in addition to those you have already described?

A. We do. The Automobile Club has since 1938 each year, and that would include the years 1943 and 1944, sponsored summer session coaches at the University of California in driver education and driver training, both for high-school teachers and for the benefit of fleet operators and others interested in learning the problems in modern traffic and ways of selecting and training drivers and the ways and means of avoiding accidents, developing sound driving practices. This of course, as I say, was given in 1943 and 1944, [126] as well as subsequent years and prior years.

Q. Are there any other safety activities in which you engage which you have not mentioned?

A. Without having a list to go over, I don't recollect right now if we have other activities.

Mr. Deibert: Take the witness.

Mr. Licking: No questions.

The Court: That is all.

Mr. Deibert: Mr. Addison G. Strong.

ADDISON G. STRONG,

called as a witness on behalf of the plaintiff: and being first duly sworn, testified as follows:

Mr. Deibert: Your Honor, I might say for your information Mr. Strong is a member of the certified public accounting firm of Hood and Strong of this city, and has been the auditor and accountant for plaintiff in this case over a long period of years, and I thought perhaps if we could stipulate to that fact we might save time and a good deal of effort to qualify him.

Mr. Licking: I will stipulate that he is qualified—

The Court: Why don't you broaden the stipulation and suggest to Counsel what you expect to prove by him?

Mr. Licking: I will further stipulate that Mr. Strong prepared or supervised the preparation of the figures which [127] were submitted with Mr. Watkins' affidavit and those figures that appear in the income tax returns which are already on file.

Mr. Deibert: Yes.

Q. That is correct, isn't it? A. Yes.

The Court: Is that what you want to prove?

Mr. Deibert: No, that is not the purpose, your Honor.

Mr. Licking: What is it?

Mr. Deibert: The purpose is to show whether there were any deficiencies or net incomes at the end of the various years going back—we have not gone back to the inception of the Association, but

(Testimony of Addison G. Strong.)

we have taken the years from 1931 to 1941, inclusive.

The Court: Isn't that in evidence?

Mr. Deibert: No.

Mr. Licking: Counsel, that is already in evidence.

Mr. Deibert: No, I beg your pardon, they are not in evidence—are they, Mr. Strong?

A. No, not in entirety.

Mr. Licking: They are here. It shows some years there was a loss and some years a profit.

The Court: Yes, there was an exhibit that showed that.

Mr. Licking: Yes, from 1931 to 1940, showing profit and loss. It is a part of Exhibit 1, part of Watkins' affidavit. [128]

Mr. Deibert: What I hold in my hand, your Honor, is a statement made by Mr. Strong showing the position of the surplus balance, and that is, in its entirety, in the exhibit which is attached to Mr. Watkins' affidavit.

Mr. Licking: Very well, the books will be the best evidence. If the books are not here I can't cross-examine the witness.

Mr. Deibert: Well, these figures have been taken— How did you get these figures?

A. I got them from the books.

Q. Directly from the books?

Mr. Licking: Well, if the books are not here. I can't cross-examine the witness and I object to the compilation.

(Testimony of Addison G. Strong.)

The Court: That is true, he can't cross-examine the witness if the books are not here, if he is testifying from a recap of the books.

Mr. Deibert: May he not testify from a compilation, your Honor, which he took directly from the books?

The Court: Well, the difficulty is that Counsel cannot cross-examine him without the books being present.

Mr. Deibert: I think he can cross-examine him from this statement which is a resume of the books.

Mr. Licking: (referring to document): What are the doughnuts on here supposed to represent?

Mr. Deibert: The figures in red, and those are the [129] deficiencies.

Mr. Licking: Those are the deficiencies?

Mr. Deibert: Yes, those are the deficiencies.

Mr. Licking: All right, I will stipulate it can be introduced in evidence as your exhibit without any examination.

Mr. Deibert: Very well.

The Court: For what years does it cover?

Mr. Licking: It covers the years apparently from 1931 through 1947.

Mr. Deibert: No, for the first quarter of 1947.

Mr. Licking: For the first quarter of 1947. It shows certain years where there is an excess of income over current expenses. There is one thing, your Honor, the bookkeeping system and the returns of the organization are on a cash basis.

Mr. Deibert: That is right.

(Testimony of Addison G. Strong.)

Mr. Licking: They don't show accruals.

Mr. Deibert: No.

Mr. Licking: And in that connection I will state frankly that some of the years they took in more than they spent and in some of the years they did not, and in these particular years they took in more than they spent, and that is the reason the tax was assessed.

The Court: "In these particular years," you mean 1942 [130] and 1943?

Mr. Deibert: Well, it covers the entire period.

Mr. Licking: 1944 and 1945.

The Court: When you say in these particular years there was a net profit—

Mr. Deibert: Yes, there was for those two years, but this statement shows the trend beginning in 1934.

Mr. Licking: Well, what the trend is is a matter of argument.

The Court: Well, you stipulate it may come into evidence. If you offer it I will receive it.

Mr. Deibert: I will offer it.

The Court: Offered and received.

Mr. Licking: May I make these in red? (circling figures in red pencil.)

(The document in question was thereupon received in evidence and marked Plaintiff's Exhibit 4.)

Mr. Licking: Have you copies of this?

Mr. Deibert: No. May I have this copy for the purpose of making copies, your Honor?

(Testimony of Addison G. Strong.)

Mr. Licking: I will stipulate it may be withdrawn in order that copies may be photostated or otherwise made.

The Court: Very well.

Mr. Deibert: Thank you, and I will furnish you with copies, Mr. Licking. That is all, Mr. Strong.

The Court: Any cross-examination?

Mr. Licking: None, your Honor. The figures speak for themselves.

Mr. Deibert: That concludes our case, your Honor.

Mr. Licking: If the Court please, for the Court's convenience I will offer in evidence now G.C.M., General Counsel's Memorandum No. 23,688, which was the basis of the assessment in the case.

Mr. Deibert: That is contained in an official publication of the Government, your Honor, but we have no objection.

Mr. Licking: It is just for the convenience of the Court.

The Court: Very well.

Mr. Licking: Those special publications, I happen to know, are not available in the library at Sacramento.

(The document in question was thereupon received in evidence and marked Defendant's Exhibit C.)

Mr. Licking: I had that in mind. The Government will rest its case.

The Court: I understand that both sides rest?

Mr. Deibert: Yes, your Honor.

Plaintiff rests.

Defendant rests.

The Court: What is the pleasure of Counsel? Did you wish to have this submitted on briefs? [132]

Mr. Deibert: I would prefer to do that, your Honor. There are a great many facts in the case, there are some questions of law, and we think it might properly be submitted on briefs.

(Discussion as to filing briefs.)

The Court: 45, 45 and 20, and the 20 to start after the brief is delivered to you, and upon filing that closing brief it will stand submitted.

CERTIFICATE OF REPORTER

I, Clarence F. Wight, Official Reporter, certify that the foregoing 132 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ CLARENCE F. WIGHT.

[Endorsed]: Filed March 2, 1948.

[132-a]

[Endorsed]: No. 12055. United States Court of Appeals for the Ninth Circuit. James G. Smyth, Collector of Internal Revenue of the First Internal Revenue Collection District of California, Appellant, vs. California State Automobile Association, a corporation, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 1, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12055

JAMES G. SMYTH, Collector of Internal Revenue
of the First Internal Revenue Collection District
of California,

Appellant,

vs.

CALIFORNIA STATE AUTOMOBILE ASSO-
CIATION, a corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS IN-
TENDED TO BE RELIED ON ON APPEAL
AND DESIGNATION OF PORTION OF
RECORD TO BE PRINTED

Appellant adopts as points on appeal the state-
ment of points filed with the court below and in-
cluded in the Transcript of Record on file herein.

Appellant designates for printing the entire
Transcript of Record on file herein except that, as
to the Exhibits in evidence the same may be consid-
ered by the Court in their original form.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ WILLIAM E. LICKING,
Assistant U. S. Attorney,
Attorneys for Appellant.

ORDER

Ordered exhibits may be so considered.

WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed November 4, 1948. Paul P.
O'Brien, Clerk.

